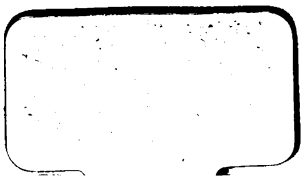

LIGHT AND AIR

"And thinks no light so cheering
As that light which heaven sheds."

MOORE.

". . . the air
Nimbly and sweetly recommends itself
Unto our gentle senses."

Macbeth, Act i, Scene 6.

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LONDON

B. T. BATSFORD, 94 HIGH HOLBORN

1908

PREFACE

TO

THE FIFTH EDITION

THIS work being again out of print, we have revised and rewritten this edition in the endeavour to make it as useful as possible.

We would warn our readers against accepting any hard and fast rules as to angles of obstruction or methods of estimating injury. Each case must depend upon its own merits, and that which is applicable in one case is entirely misleading under another set of circumstances.

We have again followed the system of tabulation, and have endeavoured to give as much information as possible in a concise manner. However, where we have considered it essential, cases are quoted *in extenso*. This especially applies in instances where a brief summary might be misleading.

With regard to the all-important case of *Colls* v. *Home and Colonial Stores*, the judgments of which in the House of Lords are given *in extenso* (commencing on p. 61), we would also like to draw our readers' attention to the case of *Kine* v. *Jolly*, reported on p. 97.

It has been thought by some that this case (also tried in the House of Lords) modifies the judgment of the first named; and, indeed, on reading the judgments of Lords Robertson

and Atkinson there seem to be some grounds for such an assumption, more especially as they concur in the dissenting judgment of Lord Justice Romer in the Court of Appeal. We thus have in the House of Lords and Court of Appeal four judges on one side and three on the other, which would not appear to be a very satisfactory state of affairs. But it must not be lost sight of that the main factor in each case is the finding of fact as to the amount of damage which accrues to the dominant owner; and in the case above mentioned the findings of the judge of first instance were perhaps a little involved.

We are much indebted to Mr. Richard Sillem, barrister-at-law, of 12 New Court, Carey Street, W.C., for the assistance he has given us in this edition, and for much useful criticism. And his most careful researches in verifying and checking cases must also add to the value of this work.

BANISTER F. FLETCHER.
H. PHILLIPS FLETCHER.

29 New Bridge Street,
Ludgate Circus, E.C.:
May 1908.

CONTENTS.

LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis's Reports, Queen's Bench, 1834–41.
Bing.	Bingham's Reports, Common Pleas, 1822–34.
Camp.	Campbell's Reports, *Nisi Prius*, 1807–16
C. & P.	Carrington and Payne's Reports, *Nisi Prius*, 1823–41.
C.B., N.S.	Common Bench Reports, New Series, 1856–65.
Ch.D.	Chancery Division, Law Reports.
Cl. & F.	Clark and Finnelly's Reports, House of Lords, 1831–46.
C. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 1834–36.
C.P.D.	Law Reports, Common Pleas Division, 1581–1603.
Cro. Eliz.	Croke, time of Elizabeth, Queen's Bench, 1852–8.
Dick	Dickens, Chancery.
Dr. & Sm.	Drewry and Smale's Reports, Chancery, 1860–65.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 1852–8.
East	East's Reports, King's Bench, 1801–12.
Eq.	Equity.
Esp.	Espinasse, *Nisi Prius*, 1793–1807.
Ex. Rep.	Welsby, Hurlstone, and Gordon's Exchequer Reports, 1847–56.
H.L.C.	Clark's House of Lords Reports, 1847–65.
H. & M.	Hemming and Miller's Reports, Chancery, 1862–5.
H. & N.	Hurlstone and Norman's Reports, Exchequer, 1856–61.
I.R., Ch.	Irish Reports, Chancery.
J. & H.	Johnson and Hemming's Reports, Chancery, 1859–62.
Keb.	Keble, King's Bench, 1661–71.

Lev. . .	Levinz's Reports, King's Bench, 1660–97.
L.J. . .	Law Journal Reports.
L.J., Ch. .	Law Journal, Chancery.
L.J., C.P. .	Law Journal, Common Pleas.
L.J., O.S. .	Law Journal Reports, Old Series, 1823–31.
L.J., Q.B. .	Law Journal Reports, Queen's Bench.
L.J.R., N.S. .	Law Journal Reports, New Series, from 1831.
L.R., Eq. .	Law Reports, Equity Cases, 1865–75.
L.R., 4 Ex. .	Law Reports, 4 Exchequer.
L.R., 5 Ch. .	Law Reports, 5 Chancery.
L.T. . .	Law Times Reports.
L.T., N.S. .	Law Times Reports, New Series.
M. & R. .	Moody and Robinson's Reports, *Nisi Prius*, 1830–44.
Myl. & C. .	Mylne and Craig, Chancery, 1837–48.
Myl. & K. .	Mylne and Keen, Chancery, 1831–5.
Mod. . .	Modern (Leach's), King's Bench, 1669–1700.
Poph. . .	Popham, Queen's Bench, 1591–1651.
R.R. . .	The Revised Reports.
Rep. . .	Coke's Reports, 1572–1616.
Sid. . .	Sir T. Siderfin, King's Bench, 1659–71.
Vern. . .	Vernon, Chancery, 1680–1711.
Ves. Sen. .	Vesey Senior's Reports, Chancery, 1747–56.
W.R. . .	Weekly Reporter.
Wms.Saunds.	Williams' Saunders' Reports.
Yel. . .	Yelverton, King's Bench, 1602–13.

TABLE OF CASES CITED.

LIGHT AND AIR.

CHAPTER I.

THE NATURE OF LIGHT AND THE LIGHTING OF BUILDINGS.

PRELIMINARY INVESTIGATIONS—REFLECTION, REFRACTION, AND DISPERSION—SOLAR LIGHT, COMPOSITION OF—PRIMARY COLOURS—COLOUR, COMBINATIONS AND CONTRASTS OF—WHITE LIGHT—ASSUMPTION THAT SKY IS UNIFORMLY LIGHTED—DIRECT SOLAR RAYS NOT USUALLY TAKEN—EFFECT OF DISTANCE—EFFUSION OF LIGHT—VERTICAL WINDOWS, SIZE OF—AFFECTED BY CLIMATE—LAWS FOR DIFFERENT CLIMATES VARY—SUGGESTIONS OF SIR WILLIAM CHAMBERS, ROBERT MORRIS, AND GWILT—MODEL BYE-LAWS AND BUILDING ACT—THE ABOVE NOT SUFFICIENT IN SOME CASES—POSITION OF WINDOWS—REGULATION OF EDUCATION DEPARTMENT—SKYLIGHTS AND LANTERNS—PANTHEON—GLAZING—TABLE SHOWING EFFECT OF DIFFERENT GLASS IN INTERCEPTING LIGHT—ASSISTED NATURAL LIGHTING—GLAZED BRICKS—COLOURS OF PAINT—EXTERNAL REFLECTORS—PRISMATIC LIGHTS.

WITHOUT going into scientific investigations with regard to the phenomena of light, a few remarks may not be out of place in order to introduce the subject of this treatise. It may be mentioned that a preliminary investigation into the elements of light will be of service to the reader, and one of the text-books on the subject may be studied with advantage. In most of such works, **reflection, refraction,** and **dispersion** are treated at length, and with the aid

of simple experiments, which are usually given, are made interesting and instructive.

SOLAR LIGHT was discovered by Newton to be a mixture, the whiteness of which is due to the proportions of its ingredients. By means of a prism of glass he threw a luminous band of light upon a screen, and this band was found to contain the following colours—blue, red, yellow, orange, green, and violet. The first three are the primary colours, and the others are an admixture caused by the overlapping of the adjacent bands in the prismatic spectrum.

The mixture or combination of the colours of the prismatic spectrum produces a ray of white light. If we attempt such a mixture with colouring materials we obtain a grey or black result in accordance with their intensity.

When an object is called a particular colour, we mean that it gives free passage to certain portions of the coloured rays and reflects others. Thus a red substance absorbs blue and yellow and reflects red. Certain combinations and contrasts of colours are pleasing to the eye, and according to Professor Barff, these are only existent when their combination, taken collectively, makes up white light. When two or more colours of the spectrum, by being blended together, produce white light, such colours are said to be complementary of each other.

Various ingenious devices have been advocated by various people for showing by graphic methods the amount of sunlight lost to windows by different obstructions, but in estimating the injury to ancient lights, often the obstruction, not of direct solar rays, but of the general light of the sky is mostly considered, it being usually assumed that the sky is uniformly illuminated.

The effect of distance must also be taken into account, inasmuch as the more remote the obstacle is, the angle of obstruction being the same, the more does the influence of diffusion of light counteract the effect of any such obstruction. This quality of diffusion is very important, as it

consists of the light being reflected from the sky, and diffused thence equally to all exposed surfaces.

The Admission of Light to buildings may be classed under the following headings:—

(*a.*) **Vertical Windows.**

(*b.*) **Skylights and Lanterns.**

(*a.*) **Vertical Windows.**—The necessary size for windows to afford sufficient light for interiors of buildings must depend very largely upon the particular circumstances in each case. For instance, in most cases, if the light in front of a window is uninterrupted, a less amount of window area would be required than if there were an obstruction, say, of another building close at hand.

The question of climate must also necessarily affect our calculations, and the laws laid down by Vitruvius, Palladio, and Scamozzi, can scarcely be applicable to climates more distant from the equator, and influenced by local considerations, it being an axiom that fewer and smaller windows are required in a warmer climate. Sir William Chambers recommended adding the depth and height of the rooms on the principal floor together, and taking one-eighth part thereof for the width of the window. Robert Morris recommended that the superficial area of the lighting surface should equal the square root of the cubical contents of the room in feet. Gwilt was of opinion that one foot superficial of light in a vertical wall, would in a square room be sufficient for 100 cubic feet of the contents, if placed centrally. This is based on the supposition that the building is free from obstruction by high objects in the neighbourhood, which, of course, is very seldom the case in towns. The model bye-laws of the Local Government Board state that the area of the windows in a room should be at least equal to one-tenth of the floor area of such room, and this provision is also incorporated in the London Building Acts, 1894–1905. It is evident, however, that, as already mentioned, while such window-openings

might be sufficient under favourable circumstances, in other cases insufficiency of light would result from following such rules, so that no hard and fast rule can be laid down, but the experience of the architect must be utilised in each particular instance.

The Position of Windows is also of importance, and must be taken into account; a room with a central or odd number of windows in a wall is always more effectively lighted and brighter than one which has an even number of windows, which necessitate a pier in the centre of the wall used for lighting. In a long narrow room more effect is obtained by lighting from the ends than from the sides, for if lighted by windows in the longer walls so many more shadows will be cast. This is well exemplified in the ball-room at Windsor Castle, which is 90 feet by 34 feet and is 33 feet high. It is illuminated by a northern window in one of the narrower sides, occupying nearly the whole width of the wall. Different types of building require different light. One of the regulations of the Education Department is to the effect that school desks should be lighted from the left-hand side. This is a wise precaution, for if the light be behind the student, the body will cast a shadow on the desk in front of him. Again, if the light be on the right hand, the desk will be in the shadow of that hand. If the light be directly in front, the reflected light from the surface of the table is directed into the eyes of the worker and causes an increased strain upon them. It is obvious that no fixed rules can be laid down as to the positions of various rooms in relation to the points of the compass, as so much depends upon the various characteristics of the site and other local considerations.

(*b.*) **Skylights and Lanterns.**—We learn from the ancients that light has a greater illuminating value when admitted through a horizontal aperture in the ceiling, and no greater proof of this can be found than in the Pantheon at Rome. The diameter of the eye of this dome is only

27 feet, and yet the building is well and sufficiently lighted, though each superficial foot of lighting area has to suffice for nearly 3,400 cubic feet of the contents of the structure.

It is therefore evident that top lighting by means of skylights and lanterns is more effective than vertical light through ordinary windows, but it is seldom possible to use such means.

Glazing.—To enumerate the various kinds of glass in use in buildings would not serve any useful purpose. In the better rooms of dwelling-houses polished plate glass ¼ in. thick is frequently used, and it has the practical advantage of affording less resistance to the admission of light. In consequence of its greater thickness it does not dissipate the heat of the room so quickly as sheet glass. It has a further advantage in that sound does not so easily penetrate it.

According to Sir David Brewster, all glass with a roughened or fluted surface increases the amount of light that penetrates any window, but it should be remembered that such surfaces are prone to harbour dust and dirt.

ASSISTED NATURAL LIGHTING.

In rooms facing narrow thoroughfares and areas adjacent to high buildings, and in basements and other places where the solar rays have but limited access, some means are often taken for assisting the natural lighting.

The covering of the face of the obstructive walls with white glazed tiles, or facing the same with white glazed bricks, does something to assist the reflection of light into such rooms, provided such walls be kept sufficiently clean.

The painting of the walls of rooms in light colours, or even lining them with white tiles, also renders them brighter and more cheerful.

It is also found that by keeping the window frame flush

with the external face of the wall, more light is admitted into the room.

Assistance to natural light can be rendered by **external reflectors** and by **prismatic lights.**

External reflectors may be placed outside windows at such an angle that they reflect the rays of light into the rooms through the windows before which they are placed.

In America and Canada the high buildings have necessitated the adoption of some means of refracting the light to the lower windows, so as to carry the illumination to the back of the rooms. This has been effected to a large extent by **luxfer prisms**, which have also been introduced into this country. They are designed upon the following principle :—The direct natural light coming from the sky is to a large extent absorbed by the floor, although even ordinary glass has some refractive influence upon light, and thus bends some rays into the room. This law of refraction has been utilised in the luxfer prisms, and the latter are so constructed and arranged to suit the varied cases that may arise, either as canopies above the windows, or flush with the windows themselves. Basements are lighted by pavement lenses, which throw the light down on to a canopy fixed vertically, which in its turn refracts the light in a horizontal direction to the rear of the apartment.

CHAPTER II.

HISTORICAL.

PRESCRIPTION—EVIDENCE IN WHICH A GRANT MIGHT BE PRESUMED —GLEBE LAND—*Nec Vi, Nec Clam, Nec Precario*—2 AND 3 WILL. 4, c. 71.

THE present limitation of time to acquire a right to window-light is of modern date.

In former times the period required varied much at different epochs. In the earliest ages of the English law (Latham's "Treatise on the Law of Window-lights") the right to window-lights by occupancy was gained by prescription, by showing the enjoyment of the window-lights since the beginning of legal memory.

In a case in the reign of Henry the Sixth, it was said by Markham, J.: "If I have a house by prescription upon my soil, and another erects a new house upon his own soil next adjoining, so near to my house that it stops the light of my house, this is a nuisance to my house; for the light is of great comfort and profit to me" (22 Hen. VI., c. 15; Vin. Abr. Nuisance, G. pl. 10). And to the same effect were the expressions of Whitlocke, C.J.: "Like to the case where a man hath a house with windows in it, and another stops the light, then he may have an action upon the case; but true it is, that he shall not only count for the loss of the air, but also he ought to prescribe that time out of mind light had entered by those windows" (*Sury* v. *Pigot*, Poph., 866; Tudor's "Leading Cases in Conveyancing," 527; *et vide* the declarations in the cases of *Bland* v. *Mosely*, cited 9 Rep., 18*a*, and *Hughes* v. *Keeme*, Yel., 215).

Curiously, this "time out of mind"—time during which the memory of man had not run to the contrary—was ultimately settled to begin with the commencement of the reign of Richard the First. Of course, such a fixed date, as time rolled on, became intolerable; and we find a case cited in the law-books (*Bowry* v. *Pope*, 1 Lev., 168), in the thirtieth and thirty-first year of Queen Elizabeth, where, after the plaintiff had obtained a verdict for the obstruction of his ancient lights, the defendant moved in arrest of judgment that the windows, by the plaintiff's own showing, had been made in the reign of Queen Mary; and the Court affirmed this.

At this time much doubt seems to have existed in the Courts, for all the justices are stated to have agreed to the following:—"That if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may, upon his own land and soil, lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land: and it was adjudged accordingly" (S. C. nomine *Bury* v. *Pope*, Cro. Eliz., 118).

It would appear that it was in the year 1623 that the fixed date was abolished, with its recurring necessity for a new date, to be from time to time agreed upon; and the time was fixed, by Act of Parliament, at twenty years. This Act, which is called the Statute of Limitations, does not allude to ancient lights at all; but, as it gave a limit of twenty years to the power of recovering by ejectment, it was considered sufficient to confer a title to an easement belonging to the house—Chief Justice Wilmot pithily remarking, "If my possession of the house cannot be disturbed, shall I be disturbed in my lights?"

Yet at this period the law seems to have been uncertain, and to have had a good deal of the "John Roe" and "Richard Doe" (now somewhat exploded) about its methods; for twenty years did not give absolute right, but it was presumptive proof from which the jury *were directed* to find the existence of an agreement, the theory being that there was an agreement between the parties. Of course, this agreement was non-existent in reality; Lord Mansfield saying that the enjoyment of lights, with the defendant's acquiescence, for twenty years is such decisive presumption of a right, by grant or otherwise, that, unless contradicted or explained, the jury ought to believe it—his view being that it was impossible that length of time (not even time immemorial) can do more than create a presumptive bar.

A curious case is quoted in the law-books (*Darwin* v. *Upton*, 2 Wms. Saunds., 175*b*), where windows had been enjoyed for more than twenty years. The defence was that twenty-five years before—that is, five years before the commencement of the running of the twenty years—the owner of the adjoining land had given permission to put one window, and it was contended that this could be the only grant sustained; and the judge considered it a point that might be left to the jury to decide.

The old law would appear to have been, at this time, that twenty years' uninterrupted possession was evidence from which a jury might presume a grant, and had to be taken with the qualification that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years had no power to grant any such right for a longer period than during the continuance of his particular estate. If a tenant for life or years permitted another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determined, such user would not affect him who had the inheritance in reversion or remainder; but when it vested in possession, he might

dispute the right to the easement (*Yard* v. *Ford*, 2 Wms. Saunds., 175*e*).

And there are other cases, as, for example, *Daniel* v. *North* (11 East, 372), in which it was so held. In this case, without the knowledge of the reversioner, a person had enjoyed the use of windows he had put for more than twenty years without any interruption from the owner of the opposite premises, who, however, was only a tenant holding a lease. He did not acquire a legal right; and when the premises opposite were let to another tenant, who raised the wall and so injured the light, he could not obtain any relief.

Curiously enough, it was held, where right of light had been enjoyed from glebe land for more than the prescribed time, yet, on the glebe land being conveyed to a defendant, who built thereon and obstructed the light to these windows, that no ancient light had been created; that at most the grant must be presumed to have been made by a tenant for life, and therefore there was no easement.

The view taken by the judges at different epochs appears to have varied considerably, sometimes favouring more the owner of the land, who wanted to acquire light from adjacent land, and at others favouring more the right of owners to build what they liked on their own land, irrespective of any consideration how far it might affect those buildings that had been erected by the adjoining owners. As an example, it was contended that a dean and chapter could not grant an easement so as to injure their successors; but the Vice-Chancellor said, "The right which a man has in his own property is materially affected by the manner in which the owners of the adjoining property have dealt with their property. Therefore it does not follow, because the Dean and Chapter of Westminster cannot injure their successors, that the circumstance of houses having been built on the adjoining land may not of itself operate as a reason, at law, why the Dean and Chapter should not have the right

to erect the building in question. The same reasoning," he implied, " would apply to the Crown."

The law authority we have quoted says, " Still, in very many cases, the acquisition of a right to window-lights over land occupied by tenants for life or years was difficult, if not impossible." And the general rule of law was, that in order that the enjoyment, which is the *quasi* possession of an easement, might confer a right to it by length of time, it must have been open, peaceable, and as of right. The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be *nec vi, nec clam, nec precario ;* this rule raised great difficulties in the way of owners acquiring the right (see Co. Litt., 113*b*).

Such, then, is a brief view of the history, and gives the position of this important matter in the year of grace 1832, in which year an Act of Parliament was passed, having for its object the shortening of the period of prescription and to make possession a bar or title in itself, and thereby avoiding the old necessity of having recourse to the intervention of a jury to make it so.

We shall next have to consider the law as it now stands.

CHAPTER III.

PRESENT POSITION OF THE LIGHT AND AIR QUESTION.

PRESCRIPTION ACT—SECTIONS 3 AND 4—CROWN EXEMPT—DEFINITION OF LIGHT AND AIR—AIR—ACCESS OF AIR—TABLE I., INJURIES TO LIGHT AND AIR FOR WHICH THERE IS NO COMPENSATION—TABLE II., HOW EASEMENT IS ACQUIRED—RAILWAY COMPANIES—TABLE III., WHAT DOES NOT INTERFERE WITH ACQUISITION OF EASEMENT—TABLE IV., HOW ANCIENT LIGHT MAY BE JEOPARDISED—TABLE V., HOW EASEMENT MAY BE EXTINGUISHED.

THE Act of 2 & 3 Will. IV., c. 71, did away entirely with the idea that the right rested on any supposed presumption of grant or fiction of a licence. The words of the section which relate to it are:—

Sec. 3. "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sec. 4. "Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the

meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made." It is to be noted that the Crown is not bound by Section 3, not being named therein, and consequently no right of light can be obtained by virtue of that section over land in possession of the Crown, whether held directly or through trustees. *Perry* v. *Eames* ([1891] 1 Ch., 658), *Wheaton* v. *Maple & Co.* ([1893] 3 Ch., 48).

This, then, is the foundation of right, and the first step the surveyor will take, when consulted, is to see if the ancient light comes within the provision of this statute.

It may be well, before proceeding further, to have a clear understanding of "light and air," and we therefore think Mr. Latham's definition a sound one:—

"Light and air are, in the English as in the Roman law, *res communes*, things in which no permanent property can be acquired. Every one may use and enjoy them whenever he has the opportunity so to do; no one can acquire a future property in them. The right, then, cannot consist in a title to the possession of the light and air which in all future time will pass over a given space. But it must consist in some obligation, in some manner imposed on the owner of that space, to refrain from so using it as to interfere with the light and air which will pass over it to the tenement to which the light is annexed. Of this obligation we shall be able to form a clearer notion by a short examination of the respective rights of the owners of two adjoining pieces of land, previous to the acquisition of any right by the one, and the imposition of any obligation on the other.

"Every owner of land, with a few unimportant exceptions, is owner also of all the space superincumbent upon that land. *Cujus est solum, ejus est usque ad cœlum* is a maxim of the English law. And an interference with the

space superincumbent on a man's land is an injury for which the law gives a remedy. Every man may deal with his land and the space above it in such a manner as he thinks fit, so that he do no injury to his neighbour or to the public. He may erect on his land a house with as many windows as he pleases; and he may build this house on the very extremity of his land, close to the land of his neighbour. By so doing he confers no new right, and inflicts no injury on his neighbour. It is true that the windows of this building may command a view of his neighbour's gardens or pleasure-grounds, or even of the interior of his house—may so invade his privacy, and consequently lessen the value of his property. But this is not considered by the law as a wrong for which any remedy is given."

Lord Coke lays down "that a thing incorporeal cannot be appurtenant or appendant to another thing incorporeal," "so that an easement can only be claimed as accessory to a corporeal hereditament."

Some writers set forth that there can be no claim for "air," and therefore limit their observations entirely to light; but although it is rare now that a case is established for the interference of the Court upon the ground of stoppage of air, irrespective of the obstruction of light, yet such cases have arisen. But the Courts will only interfere in special cases. In *City of London Brewery Company* v. *Tennant* (9 Ch., 221), Lord Selborne (Lord Chancellor) said, "Now the nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cœlo* different from the case which has to be made for an injunction in respect of light.

"It is only in very rare and special cases, involving damage to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of the diminution of air. Therefore when witnesses say that there is a material diminution of

light and air, and say no more, they are in truth reducing the value of their evidence as to light to the standard which must be applied to evidence as to air, as to which their evidence is of no value at all."

We would urge our readers to give special attention to the last sentence in the judgment quoted. See also *Baxter* v. *Bower* (33 L. T., 41).

A right to the unobstructed passage of air through a window may be acquired by prescription at Common Law—*Aldred's Case* (9 Coke's Rep. 57), *Gale* v. *Abbott* (10 W. R., 748), *Dent* v. *Auction Mart Co.* (L. R., 2 Eq., 238). In *Bass* v. *Gregory* (25 Q. B. D., 481) a right to the passage of air through a defined channel was acquired; so, too, a covenant not to intercept the access of air sufficient for the purpose of a slaughter-house was implied from thirty years' user—*Hall* v. *Lichfield* (43 L. T., 380).

We would also refer our readers to *Aldin* v. *Latimer Clark & Co.* ([1894] 2 Ch., 437), and plates 18 and 19.

The right to access of air stands, as we see, on a different footing from that of access of light, and such right over the general unlimited surface of land could not be acquired by mere enjoyment—*Bryant* v. *Lefever* (4 C. P. D., 172). For example, a right to the access of air to a chimney of the plaintiff's house, as decided in the last-quoted case, or to the plaintiff's windmill, *Webb* v. *Bird* (13 C. B., N. S., 841; 31 L. J., C. P., 335), could not be acquired under 2 & 3 Will. IV., c. 71, Sec. 2. See also *Harris* v. *de Pinna* (33 Ch.D., 238).

In 1897 this dictum was upheld, in the case of *Chastey* v. *Ackland* (L.R. [1895] 2 Ch., 389), by the Court of Appeal, who held that there could be no right by prescription to air coming over the roofs of houses. The House of Lords, however, when this case came before them, intimated their intention of reversing it, and the parties came to an arrangement by which the appellants agreed to accept a sum of money in settlement, the respondents agreeing to pay the

costs in the House of Lords and the Courts below ([1897] A. C., 155). The House of Lords thus practically decided that in certain cases a right to air may be acquired over an indefinite area. See also *Aldin* v. *Latimer Clark & Co.* ([1894] 2 Ch., 437), plates 18 and 19 at the end of this book.

It will therefore be apparent that the surveyor must not lose sight of the question of "air"; and this loss is generally, in one's own experience, set out in the action.

The London Building Acts, 1894–1905, Sec. 88, gives a building owner the right to raise any party structure permitted by such Act to be raised; but Sec. 101 specifically states that nothing in this Act shall authorise any interference with an easement of light or other easements, &c.; and the custom of London respecting the heightening of walls is controlled by the (prescription) Act (2 & 3 Will. 4, c. 71). *Merchant Taylors' Co.* v. *Truscott* (11 Ex., 855; 25 L. J., Ex., 173); *Yates* v. *Jack* (L. R., 1 Ch., 295).

Let us now consider those cases in which the aggrieved party has no remedy against the building owner.

TABLE I.

Injuries sustained by Servient Owner, for which the Law provides no Compensation or Redress.

1. DIMINUTION OF THE VALUE OF A HOUSE CAUSED BY ITS WINDOWS BEING OVERLOOKED.
2. DESTRUCTION OF ITS PRIVACY.
3. DESTRUCTION OF ITS VIEW OR PROSPECT.
4. INJURY TO VIEW OF GOODS IN SHOP WINDOWS.

1 *and* 2. — **Overlooking and Destruction of Privacy.**—At first sight it does appear as if some compensation or relief should be granted; for, if there is one thing much esteemed by Englishmen, it is privacy, and the injury, unquestionably, in certain cases may be very great. We have in our minds three cases which have happened in our practice; one, the extension of a soldiers' hospital, the

whole of the windows of which building overlooked some villas on a portion of an estate for the owner of which we acted professionally. This building, of four lofty storeys in height, with the windows in the summer time constantly open and soldiers sitting at them, was so objectionable that the tenants of the villas (whose privacy was destroyed) left, and the owner was compelled to take a lower class of tenants at reduced rents. In the second case, a tall factory building was erected, which overlooked a croquet lawn and the secluded portion of the grounds; and in the third case, a range of model houses, the flank windows of which, on every storey, commanded a view into the adjacent owner's grounds and of his front door.

Such injuries are happening frequently where the privacy of beautiful secluded grounds is destroyed by a speculative builder, who has purchased the land adjoining, and intersects it in all directions with streets, and builds small houses, the back windows of which command the whole of the grounds (see *Chandler* v. *Thompson*, 3 Campb. 80).

It therefore behoves the architect, in advising purchases of estates, to pay much attention to surrounding land and its powers of development, as, should any of the interferences herein alluded to occur, his client will have no remedy, by injunction or by compensation, either for the loss of the privacy, or even if he can show that the renta value is most seriously depreciated.

In confirmation of the above we quote Vice-Chancellor Kindersley's words in *Turner* v. *Spooner* (1 Dr. and Sm., 467; 30 L. J., Ch., 801): "No doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard; but neither this Court nor a Court of law will interfere on the mere ground of invasion of privacy; and a party has a right to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfere, perhaps, with his comfort." A house is not "injuriously affected," within the

meaning of the sixty-eighth section of the Lands Clauses Consolidation Act, by the annoyance of people standing on a railway embankment and overlooking the house (*Re Charles Penny and the South-Eastern Railway Company*, 7 E. & B., 666; 26 L. J., Q. B., 225).

It will therefore be seen that, although other injuries caused by railways may have remedies, a railway can with impunity destroy the entire privacy of one's residence, without paying one farthing compensation.

3. **Destruction of View and Prospect.**—The law has never acknowledged that the dominant owner has a right of prospect. It was decided by Chief Justice Wray, "that for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great recommendation of a house if it has a long and large prospect" (*Aldred's Case*, 9 Coke's Rep. 57).

Justice Twisden said, "Why may I not build a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light" (*Knowles* v. *Richardson*, 1 Mod., 55; 2 Keb., 642).

Lord Hardwicke's decision, too, is important: "You come in a very special and particular case on a particular right to a prospect. I know no general rule of common law which warrants that, or says that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town" (*Attorney-General* v. *Meyrick*, 2 Ves. Sen., 453).

And in another case the same judge remarked, "It is true that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason for hindering a man from building on his own ground" (*Fishmongers' Company* v. *East India Company*, 1 Dick., 163).

Lastly, Lord Cottenham said, "It is not, as is said in one case, because the value of the property may be lessened;

and it is not, as is said in another, because a pleasant prospect may be shut out, that the Court is to interfere; it must be an injury very different in its nature and its origin to justify such an interference" (*Squire* v. *Campbell*, 1 Myl. & C., 459). But a covenant not to obstruct will be enforced (*Piggott* v. *Stratton*, 1 D. F. & J., 33; *Weston* v. *MacDermott*, L.R., 2 Ch., 72).

It may be well to give the difference between "light" and "prospect." "Light" means light of the sky; "Prospect" means the view of things on the earth.

4. **View of Goods in Shop Windows.**—The injury to a shopkeeper if his goods in a shop window cannot be seen is undoubted, and we suppose no one would doubt that if his sign-board were concealed by a projecting building, so that it could only be seen by standing directly in front of it, there would be a palpable injury to the trader. If such were not the case, would pawnbrokers be so anxious to place their well-known sign high aloft and far projecting, so that it may be seen at great distances? would chemists and some medical practitioners favour so strongly the red light? would corner premises have such exceptional value? would publicans set such store on their supposed acquired right of putting their swinging sign-post in the roadway? would tradespeople be so loth to part with pieces of land in front of their shops, if they did not consider it an advantage to expose their goods? Clearly the answer is, the rights are valuable, and that undoubtedly the trader, Mr. Smith, in the case *Smith* v. *Owen* (35 L. J., Ch., 317), where his next-door neighbour made such alteration in his premises that it prevented Mr. Smith's shop from being seen as far off as before, consequently suffered material damage. The law, however, gave no relief, Vice-Chancellor Wood holding that there was no ground for relief in Chancery. Again, where a greater injury had been inflicted by the Imperial Gas Company, who erected a gasometer which concealed the plaintiff's board, on which his name and trade were painted,

Vice-Chancellor Kindersley and Lord Chelmsford (on appeal) held that a bill in Chancery could not be maintained on that account (*Butt* v. *Imperial Gas Light and Coke Company*, 14 W. R., 508).

The decisions, therefore, decide that the law gives no relief for any of the items set out in Table I. We now come to Table II., which shows how the right to light and air is acquired.

TABLE II.

How Easement to Light and Air is Acquired.

1. By Continuous Use for Twenty Years.
2. By Express Grant.
3. By Implied Grant.
4. By a Dominant and Servient Ownership Distinct from Each Other.

[See Secs. 3 & 4, Will. 4, c. 71 (page 12, *ante*).]

1. **By Continuous Use for Twenty Years.**—The more usual method of the acquisition of light is by its continuous use and enjoyment for twenty years, and the proof of the length of time is sometimes a matter of difficulty to the dominant owner.

It must be remembered that, although the right cannot be acquired under the twenty years, yet, as it must be interrupted for the whole period of twelve months, it follows—and the law confirms it—that nineteen years and a small portion of another year prevent the possibility of contesting the right. Although at first sight this may appear strange, yet on reflection the reader will see there was absolutely no other way of deciding this point. The law being that the interruption to the twenty years must continue twelve months, clearly, therefore, a man who commenced to stop a light after the nineteen years had elapsed, could not before the expiration of the twenty years have interrupted that light for a period of twelve months, and

therefore, as no twelve months' interruption could occur, the Courts held that the light was acquired (*Flight* v. *Thomas*, 11 A. & E., 688; 8 Cl. & F., 231).

Thus, it will appear that although by law twenty years is necessary for the acquisition of the right, yet, should any one take steps to contest it by erecting obstructions, nineteen years and one day will defeat his attempt. Nevertheless such right is not completely established until the expiry of such twenty years. That is to say, it is *inchoate* till such completion of the said period, and the Courts will not interfere till such completion is accomplished. This was *held* in the case of *Lord Battersea* v. *Commissioners of Sewers* ([1895] 2 Ch., 708), where the Court held that no action could be brought till after the twenty years from the commencement of the enjoyment.

Similarly in *Bridewell Hospital* v. *Ward* ([1893] 62 L. J., Ch., 270) the Court declined to grant an injunction as the twenty years was incomplete, but intimated that a mandatory injunction could be granted after the statutory period had been completed.

In alluding to the length of time which creates this special easement, our readers will see that this has been placed at twenty years, and some explanation may be considered necessary. In the year 1874 an Act was passed, called "The Property Limitations Act"; as this Act limited the right of action to recover land to twelve years, it was thought that it might also limit the right of action for light. The many legal authorities have decided, however, that this Act does not affect the "light and air" question; so, until some bold judge, like Chief Justice Wilmot (see p. 8 of this book), shall decide otherwise, it must be taken at twenty years. It does, perhaps, seem inconsistent that the right to light should differ from the right to acquire land.

Next, it is necessary to determine how to compute the running of the time to constitute the necessary number of years to create the ancient light.

The law says the time shall run to be computed next before action brought (see Sec. 4, p. 12, *ante*), so that in computing the time it is only necessary to add the number of years from the date of action. Unquestionably this simplifies the computation of time necessary to create the ancient light.

The period of enjoyment need not be before the present action brought, but may be before any suit or action; Justice Willes remarking, "Can it reasonably be contended that the right established in the first action evanesces with the termination of the proceedings in which it is established, and that in every subsequent action the contest may be renewed? There is no estoppel, no plea of *res judicata* as to the right upon a plea, or subsequent pleading under Lord Tenterden's Act, unless enjoyment before a former suit or action may be pleaded, as in the present case."—*Cooper* v. *Hubbuck* (12 C.B., N.S., 456). See also *Hyman* v. *Van den Bergh* ([1907] 2 Ch., 576); ([1908] 1 Ch., 167), in Court of Appeal.

From the above it is clear that until some action is brought the dominant owner is always liable to lose his easement, no matter how many years have run, should he allow it to be blocked up for one year. In the case of *Parker* v. *Mitchell* (11 A. & E., 788 [1840]) it was held that, although the defendants had enjoyed the easement for fifty years before the action brought, yet as they had not so enjoyed it during the four years immediately preceding the action, they had no right to the easement (see *Tilbury* v. *Silva*, 45 Ch. D., 98, and *Presland* v. *Bingham*, 41 Ch. D., 268).

2. **By Express Grant.**—Where the right is obtained by express grant, it is, of course, only necessary to produce the document conferring the right. This document should be under seal; but it does not appear to be absolutely necessary, as an agreement in writing has been held to be sufficient *express grant*, although in the document

no mention was made of the grant of right to light, but attached to the agreement were plans and sections showing the new lights. The ground for this decision appears perfectly sound and good, and is based on Lord Eldon's decision in an earlier case, "that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous impression of title; and the circumstance of looking on is, in many cases, as strong as using words of encouragement." A verbal agreement for such a right may be enforced when there has been part performance (*McManus* v. *Cooke*, 35 Ch. D., 681).

The case of *Broomfield* v. *Williams* ([1897] 1 Ch., 602), tried in 1897 in the Court of Appeal, reversed the decision of the Court below, and Lord Justice Lindley held that, under the Conveyancing Act (1881), a grant of light is deemed to be included in a conveyance, and the fact that adjoining land was shown on the conveyance as "building land" does not show a contrary intention with regard to Sec. 6, Sub-sec. 4 of such Act. In this case the defendant conveyed to the plaintiff in fee a plot of land with a house erected thereon, reserving a right of way adjoining such plot. The deed plan showed a piece of land adjoining marked "building land," and the plaintiff's windows overlooked the same. The defendants subsequently built upon that land, and also upon such land reserved as a right of way. The plaintiffs complained mostly of the latter proceeding, but did not press for an injunction, and the Court of Appeal ordered an inquiry as to damages, Lord Justice Lindley expressing the view that it was a concession on the part of the plaintiff to practically limit his case to the buildings on the right of way.

3. **How Easements are acquired by Implied Grants.**—The principle underlying this form of easement is that a man *cannot derogate from his own grant.* This form of case frequently arises in the development of estates

where specific covenants as to easements are not inserted in the lease. The extent of the implied grant of light must be measured by circumstances existing at the date of the grant of the lease, and known to both parties (*Birmingham Banking Co.* v. *Ross*, 38 Ch. D., 295, and *Corbett* v. *Jonas* [1892], 3 Ch., 137).

In *Palmer* v. *Fletcher* (1 Sid., 167; 1 Lev., 122 [1615]), a man built a house on one part of his land and sold it to the plaintiff, and afterwards sold the adjoining portion to the defendant. *Held* that, although it was a new messuage, yet a person who claims the land by purchase from the builder cannot obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the lights are a necessary and essential part of the house.

In the above case Kelynge, J., expressed the opinion that if the land had been sold first and the house afterwards, the vendee of the land might obstruct the lights; and in *Tenant* v. *Goldwin* (2 Lord Raymond, 1089 [1704]) Lord Holt said: 'If he had sold the vacant piece of land and kept the house, without reserving benefit of the lights, the vendee might build against his house" (see also *Robinson* v. *Grave*, 29 L. T., 7; *Beddington* v. *Attlee*, 35 Ch. D., 317, 328).

The case of *Pollard* v. *Gare* (L. R. [1901], 1 Ch., 834) is a more recent decision, and in this case the plaintiff entered into a building agreement, and upon the completion of the same obtained the lease in the usual manner. The adjoining land was marked out in building plots, and a building line was marked on the plan so as to extend to all the plots. The rights to build remained, but the Court held that there was nothing to give the granters liberty to build so as to interfere with the access of light to the plaintiff. *Held* that plaintiff was entitled to an injunction restraining defendant from building on the land so as to interfere with the access of light to the plaintiff's

house, as hitherto enjoyed (see also *Quicke* v. *Chapman* [1903], 1 Ch., 659; *Godwin* v. *Schweppes* [1902], 1 Ch., 926).

Where a grantor sells a servient tenement, and either remains in possession of or sells the dominant tenement, the grantee of the servient tenement has the right to prevent an easement of light accruing to the dominant tenement. In the case of *Wheeldon* v. *Burrows* (12 Ch. D., 31, C. A., where the Court of Appeal confirmed the decision of the Vice-Chancellor) the servient owner (plaintiff) erected a hoarding under the above circumstances, and the dominant owner (defendant) overthrew the same. Vice-Chancellor Bacon delivered the following judgment:—

"The plaintiff contends that as the defendant's lights are not ancient lights, he holds his land subject to no easement; while the defendant contends that the right to lights over the plaintiff's land was implicitly reserved to him as much as if they had been expressly granted in the conveyances. The judgment in *White* v. *Bass* (reported 7 Hurlstone and Norman, 722) is clear on this point—that in a conveyance such as this there is no engagement not to build on the land, nor any limitation upon the right to use the land—*i.e.*, to use it in a lawful way, as Baron Martin said. So in *Suffield* v. *Brown*, the bowsprit case (reported 4 De Gex, Jones and Smith, 185), it was in a similar way held that a grantor should not derogate from the grant which he had made. *Pyer* v. *Carter*, quoted on the other side (1 Hurlstone and Norman's Reports), has been doubted not only by Lord Chancellor Westbury, but also by Lord Chelmsford, another Lord Chancellor. In cases where an easement has been held to pass by implication, such implication has been gathered from the necessity of the case. No such necessity seems to arise in this case. The position of the defendant's windows is not such that there is any necessity that they should overlook the plaintiff's ground. The plaintiff is entitled to an injunction

against the trespass, and an inquiry as to damages occasioned by such trespass" (see also *Ray* v. *Hazeldine*, L. R. [1904], 2 Ch., 17).

In the case of *Born* v. *Turner* (L. R. [1900], 2 Ch., 211) it was held that a mortgagee selling under statutory powers the part of property comprised in a mortgage, can give to the purchaser an implied easement of light over the unsold portion.

Where the owner in fee of a house and an adjoining field over which the light required for the windows of a house passed devised the house to A and the field to B, it was held that the right to light over the field passed to the devisee of the house, and that the devisee of the land had no right to obstruct the light (*Phillips* v. *Low* [1892], 1 Ch., 47).

4. **By a dominant and servient ownership distinct from each other.**—This probably presents one of those peculiarities which the lay mind can hardly grasp, and yet the law is most distinct upon the subject.

No rights can arise to a dominant owner antecedent to the severance of the dominant owner's and servient owner's premises. Where the two premises are in the occupation of the same person, any number of years' enjoyment will not confer a right.

This seems *common-sense*, because the right to light is, as we before explained, a right to an easement, and while premises are in one occupation an easement cannot arise.

That such is the law is shown by the well-known case, *Harbridge* v. *Warwick* (3 Ex., 552; 18 L. J., Ex., 242). The plaintiff had occupied for very many years his freehold house, and occupied during the same period an adjacent garden. The plaintiff gave up the tenancy of the adjacent garden, and its owner built a wall which obstructed plaintiff's windows. Plaintiff contended that he had had for over sixty years the right to light from such adjacent garden, but the Court decided (and this was not

appealed from, and therefore may be considered the law, as so many other cases confirm it) that the unity of possession (which means plaintiff holding his house and the adjacent garden in his possession) prevented time running to create the ancient light; therefore the time could only run from the period the plaintiff *surrendered the adjacent garden.*

Next, an important element of difficulty as to this *item* 4, where the union of ownership occurs of dominant and servient tenements. Guided by the foregoing principles, it would be imagined that the commencement of the period to create the ancient light would begin when such ownership ceases. But in law this is not the case. Such union of ownership merely suspends the running of the time so long as it continues; and Vice-Chancellor Wood held that in such a case the easement was suspended during this union of ownership, but revived upon its severance (but see as to this *Hyman* v. *Van den Bergh*, in Court of Appeal [1908], 1 Ch., 167).

While the right to light and air by its continuous use and enjoyment for twenty years may, unwittingly, be affected by purchases of the adjacent property by oneself or others, it is consoling to reflect that, although you may hold your property on lease from the same ground landlord, still your adjacent owner cannot use that fact to your prejudice. The celebrated case in this matter is *Frewen* v. *Phillips* (in the Exchequer Chamber, upon error from the Common Pleas, 11 C. B., N. S., 449; 30 L. J., C. P., 356; 7 Jur., N. S., 1247, approved and followed by the House of Lords in *Morgan* v. *Fear* [1907], A. C., 425; [1906] 2 Ch., 406). The plaintiff and defendant held the leases of two adjoining houses, both demised by the Duke of Portland in 1788. In 1857 the defendant built a conservatory, obstructing the plaintiff's windows. It was held that the plaintiff might maintain his action against the defendant for so doing. So where a tenement which had

enjoyed the access and use of light over an adjoining tenement for a period of twenty years without interruption was leased for a term of years to the plaintiffs. Subsequently and during the continuance of this term the freeholder conveyed the tenement in fee to the freeholder of the servient tenements: it was held by the Court of Appeal that the easement acquired by this tenement under Sec. 3 of the Prescription Act, 1832, was not thereby extinguished (*Richardson* v. *Graham* [1908], 1 K. B., 39).

Railway companies used not to have the power to stop adjoining owners from acquiring right of light, provided that their so acquiring such right did not in any way interfere with the companies working their railway. The most celebrated case was the case of *Norton* v. *London and North-Western Railway Company* (9 Ch. D., 623 [1878]), in which it was decided that the company had no right to erect screens to prevent the houses of the adjoining land acquiring right of light—*Mitchell* v. *Cantrill* (37 Ch. D., 56), *Haynes* v. *King* ([1893] 3 Ch., 439).

This case, however, was overruled by the judgment in *Bonner* v. *Great Western Railway* (24 Ch. D., 1), in 1883, and *Foster* v. *London, Chatham, and Dover Railway Company* ([1895] 1 Q. B., 711), and railway companies have as much right to block up their neighbours' windows as any other landowner.

TABLE III.

What does not interfere with the Acquisition of the Easement.

1. NON-COMPLETION OF THE HOUSE OR BUILDING.
2. NON-OCCUPATION.
3. ENJOYMENT OF EASEMENT SUSPENDED.

1. **Non-completion of House or Building.**—We think this is so important that we may well devote a separate table to its consideration. It has been so fre-

quently stated that the continuous use for the fixed period of twenty years gives the right, and that to prove the enjoyment for that fixed period is the essence of the case for the plaintiff, that it may surprise our readers to know that *occupation* and *enjoyment* need not extend to the whole of the period required to create such *ancient light*, and that the period of prescription begins as soon as the windows are put in the dominant house, capable of being opened and shut and of admitting light.

2. **Non-occupation.**—It is not necessary that the house should be occupied (*Courtauld* v. *Legh*, L. R., 4 Ex., 126). In this case it was held that, though the fittings, papering, &c., were not completed for five years after the time commenced to run necessary to create the statutory right to ancient lights, this did not interfere with the effluxion of time necessary for the acquirement of such light. Further, that, notwithstanding the necessity of the enjoyment for the fixed period, yet, although the house was really uninhabitable, and was not as a matter of fact occupied for some years after the commencement of the running of the time to create the ancient light, the Court of Exchequer held that the right had accrued from virtually the completion of the carcase of the building; and it may interest our readers to know that as to the enjoyment (which, as no tenant had enjoyed, appeared a stumbling-block to this portion of the case), it was held that it was not necessarily by occupation, but might be by ownership. In the case of a right to light and air arising through prescription, the time from which prescription is to be computed commences when the exterior walls with the window openings are completed and the building roofed in, although the window sashes and the glass be not inserted, nor the interior finished for some time afterwards (*Collis* v. *Laugher* [1894], 3 Ch., 659; see also *Cooper* v. *Straker*, 40 Ch. D., 21; *Smith* v. *Baxter* [1900], 2 Ch., 138).

3. **Enjoyment of Easement Suspended.**—With regard to this, an important decision has been given, showing that when a building is pulled down, and clearly the actual enjoyment of an easement of light has ceased, this does not operate as a loss of the easement. We think it so important that we give the head-note to the case, which is *Ecclesiastical Commissioners for England* v. *Kino* (14 Ch. D., 213); see also *Easton* v. *Isted* ([1903] 1 Ch., 405).

Head-note.—In this case it was held that where a building with ancient lights has been pulled down, and the actual enjoyment of that easement (though not the easement itself) has been in consequence suspended, the owner of the building can apply to the Court to restrain an erection which would interfere with the easement, when the Court is satisfied that he is about to restore the building with its ancient lights. Accordingly, when under their Act and Order in Council a church had been vested in the Ecclesiastical Commissioners upon trust to pull it down and sell the materials and site, and the church had been taken down, the Commissioners were held entitled to an injunction restraining the defendant from erecting a building which would necessarily interfere with the access of light to windows to be erected in the same position as those of the church which had been pulled down, and the fact that there were no windows then existing did not at all interfere with their right to such injunction, there being no intention of abandonment of the right to light.

The Ecclesiastical Commissioners, as owners in fee simple of a church which they have under an order pulled down, are not in a different position from any other owner, and can give to a purchaser from them exactly the same rights which he would have had if he had bought the building as it stood.

Semble, there is no legal impossibility in a grant or a covenant by a rector to or with the churchwardens on behalf of the parish, if made with the proper consents, that

the church shall have a perpetual right to access of air and light to its windows over the glebe.

In cases of obstruction to light, the rule of the angle of forty-five degrees is only to be used as a test in the absence of any other mode of arriving at a conclusion, it is no rule or presumption of law. The angle of forty-five degrees is not taken from the windows, but from the top of one house to the level of the street on the other side.

An undertaking given by a defendant to pull down if his works should interfere with the plaintiff's access of light, should always be rigorously enforced.

JAMES, L. J.—"In this case we have to consider whether or no we should grant an interlocutory injunction. Upon the point upon which the Vice-Chancellor disposed of the application to him, I am not able to agree with him. It appears to me that there is nothing whatever to prevent the owner of a building which has been taken down, and has during that time had its right of light, though the actual enjoyment of the light has been suspended, from applying to the Court for an injunction to restrain an erection which would interfere with that easement, which is not at all destroyed or suspended, although the practical enjoyment of it is suspended, where the Court is satisfied that he is about to restore the building, and to restore it with its ancient lights. That was so decided by Lord Justice Giffard in *Straight* v. *Burn* (L. R., 5 Ch., 163 [1869]), which, unfortunately, was not brought to the attention of the Vice-Chancellor, and I cannot see any distinction between that case and this. There the house was taken down and a wall was left standing with holes in it. Here the church was taken down, and the fact that no wall was left standing with holes in it does not, I think, make any substantial difference, because there is no doubt that the object was that the property, which is in the City of London, should be sold for the purpose of being built on; and there is very little doubt that, as far as possible,

the purchaser from the Ecclesiastical Commissioners would take and preserve the valuable rights of light. On that point I cannot agree with the Vice-Chancellor."

Having treated of how the right to light and air may be acquired, and what acts, although apparently injurious to that right, do not really affect it, we shall next consider how the right may be jeopardised, which will be set forth in Table IV., and then how such right may be lost, which we set out in Table V.; and thereafter we shall give Table VI., setting forth what it is necessary for the surveyor to consider in estimating the damage or injury.

TABLE IV.

How the Easement may be Jeopardised.

1. By Alterations to Buildings.
2. By Variations of the Plane at which Light is Admitted.
3. By Advancement of a Wall.
4. By Removal of Buildings.
5. By the Occupation by the Dominant Owner of the Servient Owner's Premises.
6. By Ownership of both Properties being in the same Parties.
7. Enjoyment by Consent or Agreement.

1. **By Alterations to Buildings.**—The most important case bearing upon this subject is *Tapling* v. *Jones* (11 H. L. C., 290; 34 L. T. C., p. 342 [1865]), which was fought up to the House of Lords, and heard there on the 17th, 20th, 21st of February, and 16th March, 1865, the action having been commenced in the Court of Common Pleas on the 24th of February 1858. This case decided that where there are ancient lights and other lights are added, and an obstruction is raised against the added lights, which from their position cannot be obstructed without also obstructing the ancient lights, then such obstruction is illegal.

The owner of ancient lights may pull down his building with a view to restoration without interfering with his right to light (*Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D., 213). He may change the purpose for which the building is used (*Scott* v. *Pape*, 31 Ch. D., 869), and may make alterations in the framework and glazing of his windows without losing his right (*Turner* v. *Spooner*, 1 Dr. & Sm., 407). Where before the rebuilding of premises having ancient lights a partial interference with these lights by the owner of the servient tenement would not be sufficient to entitle the dominant owner to an injunction, the same amount of interference, even though completely blocking up the remnant of ancient light left after rebuilding, will not be an actionable wrong (*Ankerson* v. *Connelly* [1907], 1 Ch., 678). See *Colls* v. *Home and Colonial Stores*, *per* Lord Davey [1904], A. C., 179.

2. **By variations of the plane at which light is admitted.**—An important case is *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (6 Ch. D., 757 [1877]). (See also *Newsom* v. *Pender*, 27 Ch. D., 43; *Barnes* v. *Loach*, 4 Q. B. D., 494; *Bullers* v. *Dickinson*, 29 Ch. D., 155.)

In this case the National Provincial Plate Glass Insurance Company, the plaintiffs, occupied and held for long terms of years No. 66 Ludgate Hill; and the Prudential Assurance Company, the defendants, were owners of buildings to the east and to the north of the building held by the plaintiffs. In 1870 the plaintiffs rebuilt their premises. They set back the upper floors of the east face of their building about 5 feet 8 inches, the plane of the face of the new building being parallel to that of the old building, and the windows in the new building nearly corresponding with those in the old building. A room on the ground floor of the old building was lighted by a dormer window of three faces, light to which came from an opening or well-hole between the building of the plaintiffs and that of the

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defendants. The ground floor of the new building was the same as in the old building, but instead of the dormer window, the plaintiffs put a skylight, partially co-extensive with the old window, though of a different shape, and this alteration was made in order to comply with certain provisions of the Metropolitan Building Acts.

In 1876 the defendants began to rebuild their premises, and had partially rebuilt them, when the plaintiffs brought this action, alleging that access of light to the windows on the east face of their building, and to the room on the ground floor, was already obstructed by what had been built, and that the erection of the new building to the height proposed would be an invasion of the plaintiffs' right to access of light, and most prejudicial to the enjoyment of their premises; and the plaintiffs claimed an injunction and damages.

On the 23rd of June 1876, the Master of the Rolls, Sir George Jessel, refused to grant an injunction on an interlocutory application.

The action came on for trial on the 12th July 1877, before Fry, J.

The judgment of the Court was that it had not been shown "that the access of light to the east windows would be affected, and that the building of a certain bow window would not affect the access of light to the ground floor, but that the raising of the party wall had affected the access of light to the ground floor," and continued in these words:—

"The case, therefore, resolves itself into a question as to the effect of the party wall upon the window on the ground floor, with regard to which various points have been suggested in argument. In the first place it is said that the change which the plaintiffs have themselves effected in the mode of lighting their ground floor deprives them of any right under the statute. It is said that the aperture must be the same, or, to use the proposition put forward

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by Mr. Cookson, it must be the same in every respect, except extension in the same plane as the original window, that concession being necessary in consequence of the decision in *Tapling* v. *Jones* (11 H. L. C., 290 [1865]; 34 L. J., C. P., p. 342 [1865]).

"Now, the words of the statute which regulate this matter (2 & 3 Will. IV., c. 71, s. 3) are, 'That when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible.'

"I understood it to have been suggested in argument that the house must be the same; but if that argument be urged, I am prepared to hold that it is not tenable, and that the house need not be identical in every respect. We are not to be involved in those delicate questions of identity of structure which puzzled the Athenians with regard to their sacred trireme, or which are said to have been raised with regard to a knife. It is enough, as it seems to me, if the house be for practical purposes the same house, and this house standing upon the old foundations is, in my opinion, the same house, if it be necessary that the house shall be the same in order to bring the case within the statute. But I am not convinced even of that. In my view, the conversion of a dwelling-house into a workshop or other building would not deprive the workshop or other building of its right to the access of light which the dwelling-house had enjoyed. However, the point does not appear to me necessary for decision in the present case.

"The next question which arises on the statute is this: It is said that the access of light to the dwelling-house must be identical, and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now, in its breadth, that proposition is not

true, because the case of *Tapling* v. *Jones* (11 H. L. C., 290 [1865]; 34 L. J., C. P., p. 342 [1865]) has shown that you may destroy the identical aperture, by taking away the surrounding lines of that aperture, and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light; and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that, wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. I come to that conclusion for this reason—that you do not want a statute to give you a right of access, in your own premises, to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement.

"But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because, of course, the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all cases the Court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement. It is said that that conclusion is inconsistent with the definition given by Lord Westbury in *Tapling* v. *Jones* (11 H. L. C., 290 [1865]; 34 L. J., C. P., p. 342 [1865]), but in my opinion that is not so; and Lord Westbury, in referring to a window as equivalent to an access, only means that the window in effect defines the access. And that that was the view taken by the House

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of Lords seems to me confirmed by a passage in the judgment of Lord Chelmsford, in which he says: 'By the Prescription Act, then, after twenty years' user of the lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted.' In other words, he seems to me to say that the aperture through which the access of light has been admitted is the measure of the access which is to be enjoyed over the servient tenement.

"This case seems to me to illustrate the propriety of not introducing into the construction of the statute any questions with regard to aperture, opening, or window, except so far as the statute itself introduces them. For instance, in the present case no less than three openings have been suggested as being the decisive or dominant openings to which regard must be had. In the first place, there is a suggestion, which I believe I threw out, that the interstice between the sides of the wall and the overhanging top and bottom where the dormer was situated might itself be the opening, because I conceive there can be no doubt that by a grant of the house that space would pass, and you have therefore a confined opening from the adjoining premises into what in law is the plaintiffs' house. The second, which is that on which the plaintiffs mainly relied, was that the dormer window, consisting of glass arranged in three distinct planes, was itself the aperture to which regard must be had. The Master of the Rolls, in his judgment on the interlocutory application, seems to have been inclined to a third view, that the aperture to which you must have regard was the opening in the ceiling in the plaintiffs' room through which the light

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found its way from the dormer into the plaintiffs' room. But it seems to me not necessary to determine any of these questions. If that dormer window had for twenty years received light passing through a space over the defendants' premises, any aperture which the plaintiffs may be minded to use, and which lets in any portion of the light passing through that same space, is protected by the Act—it is the same access to the same dwelling-house. When you have those circumstances it seems to me you have all that the Act requires.

"I hold, in the present case, that there has been for twenty years an access of light to the plaintiffs' dwelling-house through a portion of space over the defendants' tenement, which reached the ground floor of the plaintiffs' house, and a portion of which, if not the whole, still reaches the same tenement of the plaintiffs' through an aperture. I have said that it does not appear to me to be necessary to determine whether the aperture be or be not the same. Further than that, if I am wrong in the conclusion that the aperture need not be the same, I yet think that in this case I ought to hold that as to so much of the new aperture as does let through the old light, it ought to be deemed the same aperture."

In the case of *Andrews* v. *Waite* ([1907] 2 Ch., 500) it was held that the question whether the right to access of light to a building which has been enjoyed through one window is preserved upon an alteration of the building depends on the identity of light, not on the indentity of aperture.

In cases where the light comes to any window over the roof of higher buildings at an angle, and the building is altered by advancing the wall in which the window is, the right to access of light will be preserved if any window or aperture in the new wall intercepts and gives access to any substantial part of the light which passed through the old

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window. It makes no difference that the new window or aperture is at a much higher level than the old window. No alteration of a building which would not involve the loss to a right to light when indefeasibly acquired, will, if made during the currency of the statutory period, prevent the acquisition of the right.

Mr. Justice Neville, in giving judgment in this case, said: "That being so, the conclusion I have come to is this, that a substantial amount of light which comes in through the present skylight and the new windows on the first floor reaches the places where the old windows on the ground and first floors were situated both before and after the alterations of 1888 and 1895, and I think that the buildings proposed by the defendant would occasion a nuisance to the occupants of the house as it exists, and to a house lighted, as to its first and ground floors, as the old house was both before and after the alterations.

"The question then arises: On those findings of fact, is the plaintiff entitled to the relief that he claims? It has been argued that there has been such an alteration of his premises, both in 1888 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That, I think, must depend upon the proper construction to be put upon Sec. 3 of the Prescription Act, which refers to acquisition of rights of light taken in connection with the decision of the Courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I think that is probably true; but if so, the Act shows what the law at that time was, so far as the Act purports to state anything in connection with it. I do not think that any distinction can be drawn between what, in the way of alteration, involves the loss of the right to light when once indefeasibly acquired,

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and what is sufficient to prevent the acquisition of the right during the twenty years. I say that because it seems to me from the wording of Sec. 3 of the Act that the provision which makes the right indefeasible expressly refers to the earlier part of the section which relates to the access of the light. It is upon that, I think, that the decisions of the Courts proceed with regard to the loss of the easement resulting from alterations of the dominant tenements; the reasoning of those decisions is, I think, equally applicable to the question whether or no any right has been acquired during the currency, or any right has been lost after the expiration, of the twenty years. I am confirmed in this view by the judgment of Bowen, L.J., in the case of *Scott* v. *Pape* (31 Ch. D., 554), in which the question of alteration was considered, but was considered in connection with alterations made after the right had been indefeasibly acquired. I do not think that the main decision in *Scott* v. *Pape* has been affected by the decision of the House of Lords in the case of *Colls* v. *Home and Colonial Stores* ([1904] A. C., 179), so far as it relates to the question of loss of right by alteration of buildings. It seems to me that the question which has to be determined is, whether proof is necessary of identity of the window or aperture through which the light claimed has been admitted to the dominant building, or whether the true matter for investigation is the identity of the light which has been so admitted. How far the complete alteration of the character and structure of a building may serve to prevent the acquisition of light, or the enjoyment of it after it has been indefeasibly acquired, is a matter which I think I need not consider here, because, although the plaintiff's premises have undoubtedly been considerably altered by his various improvements, the character of the building remains substantially unchanged, and the use to which the light is put in the present case is to light a shop which has been in

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existence from 1879 or 1880 up to the present time. But it has been argued that the question must be determined by consideration of whether the window is in the same vertical plane, and to what extent its position in the line of incidence of the light has been altered. In my opinion that is immaterial, provided that the light which is claimed is the same light that has been enjoyed for twenty years. I think the real test is, as I said before, identity of light, and not identity of aperture, or entrance for the light. If that is so, then in the present case the plaintiff is entitled to an injunction, because I have come to the conclusion that not only do the defendant's buildings occasion a nuisance to the plaintiff's premises as they exist at the present time, but that they would have caused a nuisance to the plaintiff's premises had they remained simply in the enjoyment of the amount of light which has been enjoyed throughout the term from 1880 upwards. I think that undoubtedly the interference with the light occasioned by the defendant's buildings would have amounted to a nuisance in 1880 or at any time since, and that seems to me to be conclusive of the case. Of course, having regard to the standard laid down in *Colls* v. *Home and Colonial Stores*, in many cases where lights have been altered it may be a matter of extreme difficulty to show that the interference is capable of legal remedy, having regard to the great difficulty of showing whether what is existing under the present conditions would have been a nuisance under the conditions formerly existing. In this case I am relieved from any real difficulty with regard to that, owing to the character of the obstruction, because it is a wall of very considerable height, built quite close to the plaintiff's buildings. I think, therefore, that the plaintiff succeeds, and that an injunction must be granted in the present case, and that the defendant must pay the costs of the action."

3. **By advancement of a wall.**—It has been held that the advancement of a wall in which ancient lights are situated will not lose the right of light, provided substantial portions of the old windows are included in the new apertures, and the fact that a wall is moved back or advanced does not *per se* alter the right, although by either operation the right may be lost if, after the building has been moved, the light which formerly flowed into the old apertures cannot come in at the new. In the case of an alteration accurate evidence as to the position of the old lights should be preserved. *Fowlers* v. *Walker* (42 L. T., 356; 51 L. J., Ch., 443); *Scott* v. *Pape* (31 Ch., 554 [1885]); *Pendarves* v. *Monro* ([1892] 1 Ch., 611).

We were engaged in *Scott* v. *Pape*, and need not give the decision of Mr. Justice North, as the case went to appeal, but we quote from the *Times* reports of 9th February 1886.

The case is very important. We therefore give *in extenso* the report, and advise its careful study.

Court of Appeal—COTTON, BOWEN, AND FRY, L.JJ., Feb. 9, 1886.

Easement—Ancient Lights—Rebuilding- Advancement of Wall.

In *Scott* v. *Pape* (31 Ch., 554 [1885]) it was held that where an old building has been pulled down and a new one erected, an easement of ancient lights will be preserved if a substantial portion of the old windows is included in the new apertures, and the fact that a frontage wall is moved back or advanced does not *per se* alter the right, although by either operation the right may be lost if after the building has been moved the light which formerly flowed into the old apertures cannot come in at the new.

LORD JUSTICE COTTON in his judgment said "that, so far as regarded those windows of the plaintiff's new building, which occupied a substantial portion of the space occupied by the former windows, it was wrong to say that the

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plaintiff intended to abandon such rights as he formerly enjoyed in respect to such old windows, so long as a substantial portion of the old windows was included in the new apertures. Then with respect to the alteration of the line of frontage, which had been advanced forward so as not to correspond with the old frontage line, it had been contended that there had been so material an alteration by the plaintiff of the face of his building as not to preserve, but in effect to abandon, the easement enjoyed before the alteration. This was a question which depended upon the construction of Section 3 of the Prescription Act (2 & 3 Will. IV., cap. 71). The *quantum* of light to which a man was entitled by prescription under the Act must depend upon the area of his windows and the distance they were from the servient buildings, and after the period of twenty years he got the statutory right to the access of light through that space of which he had been in the enjoyment for that period. The access of light depended upon the number of pencils of light coming to his windows directly or by refraction, and that right was not lost by the fact that a part only of the old windows was left in the new. The fact that the frontage wall was moved back or advanced did not *per se* alter the right, although by either operation the right might be lost if, after the building had been moved, the light which formerly flowed into the old apertures could not come in at the new. The structure might be something so entirely different, or the alteration of the frontage line—by moving it back for a distance of 100 yards, for instance—might be such that practically and substantially no portion of the old light was enjoyed by the new windows. In his Lordship's opinion the question must be whether the alteration was of such a nature as to prevent the plaintiff from alleging that he was using through the new apertures the cone of light, or a substantial part of it, which reached the old windows. If that were

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established, then, although the right must be claimed in respect of the building, it might be claimed in respect of the apertures in the new building which occupied substantially the place of those in the former building. Having regard in this case to the small advance in the line of frontage, though not small, having regard to the width of the lane in which the building was situated, the Court ought not to hold that a substantial portion of the old light did not flow through the new openings. In his opinion the decision of Mr. Justice North was right, and the appeal must be dismissed, with costs."

Lords Justices Bowen and Fry also gave judgment to the same effect showing an intention to abandon the light.

4. By removal of buildings.—The cases are *Roberts* v. *Macord* (1 Mood. & Rob. 230) and *Potts* v. *Smith* (6 L. R., Eq., 311). In the latter case, Vice-Chancellor Malins said, "There can be no prescription for light and air over open ground, because the prescription for ancient light is a thing of limited extent."

From these decisions the surveyor, therefore, may confidently advise his client (it would appear), if he is the dominant owner and has no buildings on his land, that he can have no claim to ancient light from the servient owner. Of course, if acting for the servient owner, he will advise him that he may put up any buildings on his land he may like, without fear of successful legal interference by the dominant owner.

The law being thus clear that there can be no easement of light for garden purposes, nor for timber-yards or saw-pits, our reader will see the importance, where old buildings are removed, if he is acting for the dominant owner, to take care before their demolition (1) to have carefully prepared drawings showing the ancient lights; (2) to take care that the new buildings are erected before

the expiry of the time after which they would cease to be ancient lights.

5. **By the occupation by the dominant owner of the servient owner's premises.**—This is important; for, suppose the dominant owner to have windows overlooking the servient owner's premises, and which have enjoyed light for, say, sixteen years, and he takes on a yearly or other tenancy the servient owner's premises, the time will *cease to run* during all the time he holds the two premises in his occupation, the easement being suspended, and directly he surrenders the adjacent premises the easement will be revived. This method of jeopardising the time necessary to acquire an ancient light may be serious.

6. **By ownership of both properties being in the same parties.**—This is another period of estopping the running of the time, which is by purchasing the adjacent servient owner's premises. The law says, "Where the easement has been acquired, a subsequent union of the ownership of dominant and servient tenements does not extinguish the easement, but merely suspends it during all the time the union of ownership continues, the revival of the easement taking place on the severance." The case which we think is most important and is to be relied on is *Simper* v. *Foley* (2 J. & H., 535 [1862]. See also *Ladyman* v. *Grave*, L. R., 61 Ch., 763), where the dominant owner had an easement of light over some cottages for twenty years. The dominant owner was the tenant of the premises, and his landlord purchased the adjoining cottages in the year 1837, and sold them in the year 1860, the ownership being united from 1837 until such sale in 1860. It was in this case held that the easement was suspended, and that it revived in 1860. (See as to this *Hyman* v. *Van den Bergh* [1908], 1 Ch., 167.)

Having treated very fully of how the right of light may be jeopardised, we have next to consider, in Table V., how it may be lost.

7. **Enjoyment by consent or agreement** (see Sec. 3 of the Act, p. 12).—It is important to bear this in mind, for there are many cases in which parties are not sufficiently alive to the importance of not doing anything during the period of twenty years before action which can be construed as an admission in writing that the light is being enjoyed by the consent of the servient owner. The point is illustrated by the recent case of *Hyman* v. *Van den Bergh* ([1907] 2 Ch., 516; [1908] 1 Ch., 167, in Court of Appeal). The facts in that case were as follows:—C, who was the tenant of a cowshed, owned in fee simple by H, had in 1896 been in the actual enjoyment of the access of light over the adjacent land of V to the windows of the shed for more than nineteen years without any interruption. In 1896, at the end of this period of enjoyment, V obstructed the windows. C at once removed the obstruction, and the windows remained unobstructed until 1898, when W, the surveyor of V, by his instructions again obstructed the windows. C again removed the obstruction, but, being under the erroneous impression that he was not entitled to an injunction to restrain the obstruction, he interviewed W, who told him that V had again instructed him to obstruct the windows, and that he should do so unless C gave him some document which would preserve the rights of V.

C thereupon (in January 1899) wrote a letter, addressed only to W, saying, "I will give you one shilling per annum for the use of those eight lights you have boarded up in my cowshed." No answer was sent to this letter, but W had it stamped as an agreement, and in reliance on it V refrained from re-erecting the obstruction. The promised shilling was never paid. Payment of the arrears was demanded in June 1903 but not made. In July 1906 V again obstructed the windows, and within a week H commenced an action against V for an injunction to restrain the obstruction.

Held, that the letter was a "consent or agreement expressly made or given" for the purpose of the enjoyment of the access and use of the light "by writing" within the meaning of Sec. 3 of the Act, and that as there had not been enjoyment, without such consent or agreement, for the twenty years next before the commencement of the action, H had not a right to the enjoyment of the light under the Act. The principle of *Simper* v. *Foley* (2 J. & H. 535 [1862]), and *Ladyman* v. *Grave* (L. R. 6, Ch., 763 [1871]), not extended so as to exclude, in the computation of the twenty years next before action, a period during which enjoyment has been by consent or agreement within Sec. 3 of the Act.

TABLE V.

How Easements of Ancient Lights may be extinguished.

1. By Acquiescence in Obstruction.
2. By Agreement between the Dominant and Servient Owners, or Express Release.
3. By Abandonment.
4. By Acts of Parliament.

We have shown how right to light and air is acquired under the Act of 2 & 3 Will. IV., c. 71, but that Act is silent as to how that right may be extinguished; we have, therefore, only the decisions of the Courts in specific cases to guide us. Latham, in his work, lays it down "that the modes of the loss of window-light correspond to its acquisition." But this will not help us much when we have to consider *item* 3 in the above Table, for we shall find that a loss of ancient light may arise in less than twenty years, if, from the circumstances of the case, an intention to abandon can be shown, while in the case of the acquisition of light no intention of any kind operates.

The intention to abandon a right to light must be clearly established (*Greenwood* v. *Hornsey*, 33 Ch. D., 471).

1. **By acquiescence in obstruction.**—Undoubtedly the easiest way for the servient owner to rid himself of that most objectionable position of having to give his neighbour light without fee or reward, is to block up the opening for twelve months. Now, should the dominant owner not discover this obstruction for twelve months, his ancient light is lost. It may be asked, Is it likely that an owner can have his windows obstructed for twelve months without his knowledge? But we think our readers will see that this might easily happen, by the house being empty for that period, and the letting being intrusted to a negligent agent; or being occupied by a tenant too careless to inform the owner, or, as sometimes happens, not being on friendly terms with the landlord, purposely omitting to mention the circumstance; and, lastly, by bribery or collusion (if undiscovered).

NOTE.—The practical method of blocking out a window is, of course, known to all surveyors. The only point we need call attention to is that the surveyor should take care that the obstruction he puts up is sufficiently large to really obstruct all light, and this obstruction should during the year be daily watched, and a record kept, as the dominant owner may contend the obstruction was not for one entire year, and in such cases it will be necessary to produce proof.

2. **By agreement between the dominant and servient owners, or express release.**—This needs little explanation. The parties entitled, as they can create the right by express grant, so can they by express release get rid of the right. It would also appear that a mere agreement between the parties is equally binding.

3. **By abandonment.**—This is more complicated. It would appear that to lose the light by blocking up the opening, the window must have been so blocked up that no light came through it for the period of twenty years.

Lord Ellenborough's dictum is still the law: "When a window has been shut up for twenty years the case stands as though it had never existed" (*Lawrence* v. *Obea*, 3 Camp, 514; 14 R. R. 830 [1814]).

While you are, therefore, absolutely certain that such a window is abandoned, there are pitfalls in waiting as to some other supposed abandonments.

In the case of *Liggins* v. *Inge* (7 Bing., 682), it was held that where it could be collected from the circumstances of the case that there was an intention to abandon the right, it was not at all necessary that twenty years need run.

How difficult it must sometimes be to know the intention; and therefore how likely that the adjoining owner may be deceived, and consequently involved in litigation!

The celebrated case on this point, which was argued in the Court of King's Bench, is as follows (*Moore* v. *Rawson*, 3 B. and C. 336; 3 L. J., O. S., K. B., 32 [1824], and see *Cook* v. *Bath*, 6 Eq., 177):—The plaintiff had a house, adjoining which was a shop which had ancient windows. Some seventeen years before the action, the occupier, who was also owner, pulled down the shop, and erected on the site a stable building with a blank wall, where formerly had been the wall with windows therein. Some long time after this, the defendant erected a new building. The plaintiff then opened a window in his stable wall just where his ancient lights had been, and afterwards commenced the action against the defendant claiming these openings as ancient lights.

The judgment was in favour of the defendant, Justice Littledale remarking, "In this case I think that the owner of the plaintiff's premises abandoned his right to the ancient lights by erecting the blank wall, instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light he once had. Under these circumstances, I think that

the temporary disuse was a complete abandonment of the right."

Next, we will consider the case where it was held that, although the windows were blocked up, there was not an intention to abandon (*Stokoe* v. *Singers*, 8 El. and Bl. 31 ; 26 L. J., Q. B., 257 [1857]). The facts were as follows :— The plaintiff's predecessor was owner of a house in which there were ancient windows. He blocked them up; but the appearance of the premises was such that it was obvious to a spectator from without that there had formerly been windows, and it was disputed whether it would or would not appear that there were still windows there. Nineteen years after this, the defendant, having become owner of the adjoining land, showed an intention of building on it in a manner which would prevent the plaintiff from ever again opening the blocked-up windows. The plaintiff thereupon opened the windows in order to assert his right. The defendant erected a hoarding on his own land so as to obstruct these windows, and for this obstruction the action was brought. Baron Martin told the jury that, assuming the right had existed, the question would arise whether it had ceased. He explained at considerable length that there were various ways in which the right might be lost. He stated that the right might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but closing them for a mere temporary purpose would not be so. He also stated that, though the person entitled to the right might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it as to induce the owner of the adjoining land to alter his position in the reasonable belief that the right was abandoned, there would be a preclusion as against him from ever claiming the right. The jury found for the plaintiff. A rule for a new trial was allowed, on the ground of misdirection, "in directing

the jury to find for the plaintiff, unless they were satisfied that the lights referred to in the evidence had been closed with the intention of never opening them again." But the Court of Queen's Bench discharged the rule, saying, "Taking the whole summing-up together, it seems to us that the true points were left by the judge to the jury, and found for the plaintiff. We consider the jury to have found that the plaintiff's predecessor did not so close up his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the right of using them."

It will be a good guide, if our readers are in doubt as to any case we may have to deal with, to see how far it is on "all-fours" with the following judgment of the Court, delivered by Chief Justice Denman in making a rule absolute for a new trial on the ground of misdirection by Baron Platt, who, in a case of easement, had told the jury that a shorter period than twenty years would destroy a right:—"The learned judge appears to have proceeded on the ground that, as twenty years' user, in the absence of an express grant, would have been necessary for the acquisition of the right, so twenty years' cesser of the use, in the absence of any express release, was necessary for its loss; but we apprehend that as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act *clearly indicative of an intention to abandon the right, would have the same effect, without any reference to time.* It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period

may be sufficient in any particular case must depend upon all the accompanying circumstances."

The case of *Smith* v. *Baxter* ([1900], 2 Ch., 138) is a useful guide to the modern trend of case law with regard to abandonment. The plaintiffs rebuilt their premises, but claimed an easement of ancient lights with respect to three windows of their new building which coincided with portions of three in the previous one. Such coincident area had in the case of two of the windows been boarded up, the remaining window had been partially covered with shelving, but the latter allowed a substantial amount of the light to pass into the building. *Held* with regard to the first two windows that the right had been abandoned, but that the right had not been so abandoned with reference to the third window. The Court *made* a declaration of plaintiffs' right instead of granting an injunction on the undertaking of the defendants to submit plans to the plaintiffs, the latter having liberty to apply thereafter for an injunction.

By Acts of Parliament.—The Legislature frequently passes Acts which extinguish all easements and provide for compensation in lieu thereof to persons who prove that they sustain loss thereby. So that where an Act of Parliament sanctions the purchase of land by any public body or railway company, &c., for the purpose of erecting buildings, the only remedy for an adjoining owner who has a prescriptive right is to bring an action for damages.

Where the Lands Clauses Act is incorporated in any such Act as the above mentioned, the persons acting under the Act need not purchase an easement, but may leave the injured party to seek compensation under Sec. 68 of the Lands Clauses Acts (*Clark* v. *School Board for London*, L.R., 9 Ch., 120 [1875]).

One point to remember in this method of procedure is, that it is not necessary to show any decrease in the saleable value. It is quite enough to show that the property is less

adapted for its former use, or that the business carried on has been damaged (*Eagle* v. *Charing Cross Railway Company*, L.R., 2 C. P. 638 [1867]).

When any Act permits an obstruction to light, and an aggrieved party terminates his interest owing to such obstruction, the damages are not limited to the period of the interest, but he may include for cost of removal, for fixtures, and for increased rent. In *Q.* v. *Poulter* (20 Q. B. D., 132 [1887]) the claimants held under a lease for seventeen years, but terminable by notice after three years, of which they took advantage when the premises were affected by the Railway Company. *Held*, that claim was not limited to the three years, but that compensation was recoverable for cost of lease, increased rent, and fittings, &c.

In some cases it would appear that no easement need be proved. For it was held in *Gowers Walk Schools* (*Trustees of*) v. *L. T. and Southend Ry. Co.* (24 Q. B. D., 326 [1889]) that the plaintiffs were entitled, under the Railway Clauses Consolidation Act 1845, Sec. 16, to the same measure of compensation for their new windows as for the ones that had a prescriptive right, the reason being that the Company must pay for damage accrued which would have been illegal but for their statutory powers.

It has also been held that an owner is entitled to recover compensation for injury to the value of his house due to the loss of inchoate rights (*Barlow* v. *Ross*, 24 Q. B. D., 381 [1890]).

CHAPTER IV.

VARIOUS METHODS OF ESTIMATING INJURY

PROFESSOR KERR—AMBLER *v.* GORDON—THEORIES EXPOUNDED—NOT ACCEPTED BY THE COURTS—ESTIMATING INJURY—IMPORTANT CASES OF KINE *v.* JOLLY, COLLS *v.* HOME AND COLONIAL STORES LTD.—ANGLE OF FORTY-FIVE DEGREES—TABLE VI., MATTERS TO BE CONSIDERED IN ESTIMATING VALUE OF INJURY—INJUNCTION AND DAMAGES—EFFECT OF GLAZED BRICKS—DIAGRAM OF CASES.

WE now approach the most difficult portion of our subject, and it will be necessary to point out the various methods that have been adopted for ascertaining the exact damage, because a work of this kind could not be considered complete if it did not contain the more prominent methods suggested for arriving at mathematical accuracy.

While, undoubtedly, our readers will be benefited by working out their calculations, we are bound to tell them that none of the methods of calculating injury propounded by various people are accepted by the Courts, but each case must be decided upon its merits.

Professor Kerr, speaking on the subject, after mentioning that by his method you could affirm that the obscuration is so much per cent. of the light formerly enjoyed, goes on to say, "But I am afraid, after all, that this does not help you in the Courts of law. In the first place, they won't pay attention to mathematical calculations."

The Courts consider each individual case, and in *Theed* v. *Debenham* (2 Ch. D., 165 [1876]) the decision was based on the evidence that the low or under light was of ex-

ceptional value to the plaintiff, having, in fact, a different value from that which, in ordinary cases, it would have. If the Courts had recognised the mathematical calculations, therefore, an injustice would have been done to the plaintiff; or, to put it more plainly, if mathematical calculation should be the guide, the judges were wrong in their decision. Clearly, however, the decision was *in accordance* with common-sense and justice.

This case, in so far as it was decided on the point that the plaintiff was entitled to a special amount of light, may no longer stand. It may, however, be supported, we think, on the ground that under the particular circumstances of the case the plaintiff had suffered an actionable nuisance. (See *Ambler* v. *Gordon* [1905], 1 K. B., 417; *post*, p. 57.)

The scheme propounded by Mr. Kerr for the measurement of lighting power is as follows:—A plan is made of the window, and, projecting from the centre thereof, a straight line, and from a distance along such line strike a quarter circle, which quarter circle will finish against the wall of the house; he then divides this quarter circle, or quadrant, into four parts, stating as one of his reasons his desire to retain in his scheme the angle of forty-five degrees. We would here mention, to prevent any misapprehension, that this forty-five degrees is not recognised by the law; and in another part of this book our readers will see that we have quoted the judge's dictum to this effect.

These four parts are called—*front*, this portion being directly in *front* of window; the next to it being called the *front-diagonal*, the next to that the *side-diagonal*, and the next to that, which finishes against the wall, is called the *side*. The relative values of the lighting are given thus:—

Front	61
Front-diagonal	58
Side-diagonal	53
Side	18

But, having obtained these values, it is necessary, by this system, to obtain the value of the perpendicular light; and for this purpose a vertical section is next required and a quadrant formed, having its base line projected at right angles to the wall, at the height of the centre of the window. Again, this quadrant is divided into four parts, called, and having the relative value, as follows:—

	The Value of Lighting Power
Vertical	6
Vertical inclined	29½
Horizontal inclined	47½
Horizontal	59

Having, then, these figures, the next process is to multiply these values into the values shown on the preceding list of plan values, and the result is the value of the hemisphere of lighting surface.

To find the quantity of injury, it is only necessary to form a diagram and project thereon the obstruction.

Only two points seem to require to be mentioned. The first is the small value of the "vertical." This is explained to arise from the actual diminution of lighting surface comprised in this division, owing to the inclination of the vertical lines. The second is that the values mentioned are the values of the central part of each division, and that the value has an increasing or diminishing quantity, according as it approaches either a division of a smaller or higher lighting value.

We have pointed out the reasons why the Courts will not accept this method, although so ingenious and clever.

Mr. Cox, barrister, published, in 1871, a second and revised edition of a work on this subject, with elaborate tables of calculations, showing the relative illuminating effects of every ten degrees of sky measured from the zenith; the obscuration by obstacles of uniform angular width and height, worked out from five degrees of angular width and

five degrees of angular height, to ninety degrees of angular width and ninety degrees of angular height; again, the obscuration by parts of structures five degrees in width, and a table of cosines worked to four places of decimals. It is well worthy of study, but, as in practice the system is not adopted, we make no further observation thereon.

We have now given a short outline of the mathematical methods which have been suggested, and which have been rejected as being *not practical.*

The true test of injury now would appear to resolve itself into the question as to whether the interference is such as to constitute a nuisance. In considering whether an obstruction to ancient lights amounts to an actionable nuisance, the test is not whether so much light has been taken as materially to lessen the enjoyment and use of the premises that its owner previously had, but whether so much is left as is enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind (*Higgins* v. *Betts* [1905], 2 Ch., 210).

It has been thought that where a person had enjoyed a special amount of light for the twenty years, an absolute right to such a special amount of light would be acquired. The case of *Ambler* v. *Gordon* [1905], 1 K. B., 417, seems to show that such view is erroneous. There may be cases, however, where if a man had selected a house, or shop, or warehouse having a special amount of light, with the view of carrying on a trade or a profession which needed a special amount of light, the Court might still protect such special amount of light if the diminution of light amounted to a nuisance. It would, however, be necessary to prove specifically that the business was one requiring such a special amount of light, and that the servient owner knew this is a point which, it seems to us, may still be taken in a case having these characteristics; but we do not advance this view with any degree of certainty. In giving judgment in *Ambler* v. *Gordon*, Bray, J., said: "The only fact,

therefore, that I have to deal with is the use and enjoyment of the special light for twenty years. Does that give a right to it? Now this most important point was not decided in *Colls' Case* ([1904] A. C., 179). It was much discussed, but as their Lordships came to the conclusion that there was no sufficient evidence of twenty years' user it became unnecessary to decide it. It is, however, referred to in Lord Davey's judgment, which is also the judgment of Lord Robertson, and is touched upon in Lord Lindley's; but there is certainly nothing in either of these judgments which assists the plaintiff's contention; on the contrary, the inclination of their opinion seems to be against it. There is a dictum in the judgment of Malins, V.C., in *Lanfranchi* v. *Mackenzie* (L. R., 4 Eq., 421, p. 430 [1867]) distinctly opposed to the plaintiff's contention if knowledge is not to be assumed; and Mr. Bankes was unable to point to any dictum in any case in his favour. The reasons of Malins, V.C., for thinking that no right could be gained in the absence of knowledge seem to me to be unanswerable. If the origin of the right to light is a supposed lost grant or covenant, as the cases seem to show, who would presume that the owner of the servient tenement intended to grant a special right beyond the ordinary right, where he was ignorant of the special user or enjoyment? I am, however, prepared to go further, and to hold that even twenty years' enjoyment to the knowledge of the servient tenement will not give a larger right. I think the result of the judgments in *Colls' Case* ([1904] A. C., 179) is to show that the test of the right is whether the obstruction complained of is a nuisance. If one turns to the nuisance cases, do we find any trace of a doctrine that a person in bad health or carrying on a delicate trade is entitled to more comfort or freedom from annoyance than ordinary people because for twenty years his neighbours have been aware of his state of health or the trade he was

carrying on, and have left him undisturbed? I am not aware of any decision which suggests it. Such a proposition sounds absurd. Again, I think in many of the judgments in *Colls' Case* ([1904] A. C., 179) and in other cases it is implied, if not expressed, that in measuring the quantum of light to which the owner of the dominant tenement is entitled the purpose for which he desires to use, or uses, the light should be disregarded, and does not either enlarge or diminish the easement which he has acquired. See especially the judgment of Lord Davey, where he says ([1904] A. C., p. 203): "It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard? So in *Yates* v. *Jack* (L. R., 1 Ch., 295 [1866]) Lord Cranworth rejects the argument of the defendant that the plaintiff's present business did not require a strong light, and for this business there remained a sufficient light. So, again, in *Courtauld* v. *Legh* (L. R., 4 Ex., 126 [1869]) it was held that the right was acquired, although for a part of the twenty years the house was uninhabited and unfit for habitation. It was well observed by Mr. Waugh in his argument for the defendant that the special user on which the claim is founded is a user on the dominant tenement, and not on the servient tenement. The servient tenement is not in any way affected by it. If the true doctrine be that which is laid down in *Colls' Case* ([1904] A. C., 179), that by twenty years' user all that is acquired is a right to prevent the defendant from building so as to interfere with the light previously enjoyed so materially as to amount

to a nuisance, I think it would not be logically consistent with this doctrine to hold that a larger right can be acquired. I think also that to introduce the element of the quantum of user would work inconvenience and introduce uncertainty. If the only right capable of being acquired be sufficient light for the ordinary uses of inhabitancy and business, the owner of the servient tenement knows his exact position; he knows within reasonable limits how high he can raise his buildings, and whether during the twenty years it is worth his while to obstruct his neighbour's windows. If a right to special light be capable of acquisition without his knowledge, he cannot know his position; and if he has notice of some special light being required for his neighbour's business, he cannot measure the extent with any exactitude. It seems to me altogether unreasonable to presume that any man would have made a grant of such an indefinite easement. On the whole I think both reason and authority compel me to decide this point against the plaintiff."

House of Lords' Decision in the Case of Colls *v.* Home and Colonial Stores.

The case of *Colls* v. *Home and Colonial Stores* ([1904] A.C. 179) was reversed in the House of Lords. The case is the first in which the true nature and extent of the easement of light has come up for discussion in the House of Lords, and we think that we should give a *résumé* of some of the points which it seems to us the case has elucidated. The case is reported in [1904] A. C. 179, and 73 L. J., Ch., 484, and is so important that we advise our readers to refer to the full reports which we give below. The case has also reversed the law as laid down by the Court of Appeal in *Warren* v. *Brown* ([1902] 1 K. B. 15).

Résumé of some of the Points Decided.

1. The owner of the dominant tenement is not entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution unless such diminution amounts to a nuisance (see 4 *infra*).

2. It is open to doubt whether a claim for a special amount of light for a special purpose can be sustained in law at all, and in any case it must be shown that such special amount has been enjoyed for twenty years for the special purpose and to the knowledge of the servient owner (*Ambler* v. *Gordon* [1905], 1 K. B. 417, *ante*, p. 57).

3. A person cannot by converting and using his house in a special way or for a special purpose, such as, *e.g.*, a photographic studio, throw a heavier burden on the servient tenement, except possibly in such cases as come under 2 (*supra*); but since *Ambler* v. *Gordon* (*ante*) this point is very doubtful; nor is the dominant owner deprived of his rights because he has only used a well-lighted room for a purpose which needed little light.

4. The diminution of light necessary to support an action must be such that the diminution amounts to a nuisance. The fact that there is less light than before will not support the action, but there must be a *substantial deprivation* of light so as to render the occupation of a dwelling-house *uncomfortable according to the ordinary notions of mankind*, or so as to interfere with the *beneficial use and occupation* of a shop or warehouse or other place of business.

5. In considering whether the amount of light obstructed is a nuisance regard must be had to the light coming from other sources; but it is a question whether in doing so lights other than ancient lights should be taken into consideration.

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6. The question of nuisance is one of fact for the jury or judge, as the case may be, and should be looked at broadly, having regard to all the circumstances.

7. Damages in very many cases will be an adequate remedy without an injunction.

The respondents were the lessees of a building in Worship Street, Shoreditch, in which they carried on their business. The appellant proposed to build on land on the opposite side of Worship Street (which was 41 feet wide), at No. 44, a building 42 feet high, which the respondents believed would obstruct their light, and they brought an action against the appellant for an injunction. The action was tried by Joyce, J., who found that the proposed building would not materially interfere with the access of light to any windows of the respondents except two windows on the ground floor. These windows were two out of five windows facing Worship Street in a room used by the respondents as an office for clerks, 11 ft. 10 in. in height, 50 feet deep from the windows to the back of the room, and without any window at the back. It had been the practice to use electric light in the back part of the room, and practically it was necessary to do so even in the daytime. The proposed building would not affect the selling or letting value of the respondents' premises, and they would be still sufficiently lighted for all ordinary purposes of occupancy as a place of business. Joyce, J., dismissed the action with costs. This decision was reversed by the Court of Appeal (Vaughan Williams, Romer, and Cozens-Hardy, L.JJ.), who granted an injunction to restrain the appellant from building so as to darken, injure, or obstruct any of the respondents' ancient lights or windows as they were enjoyed previously to the taking down of the building at 44 Worship Street, with an order to pull down all the building which had been so built as to darken, &c. Between the decision of Joyce, J., and the decision of the Court of Appeal the appellant had put up

his proposed building. This appeal was twice argued : first, on May 15, 18, 19, 22, before the Earl of Halsbury, L.C., and Lords Shand, Davey, and Robertson ; and secondly, on December 8, 10, 11, 1903, before the same noble and learned Lords, with the addition of Lords Macnaghten and Lindley. Lord Shand died before judgment was delivered.

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EARL OF HALSBURY, L.C. : My Lords, in this case, which was tried before Joyce, J., the learned Judge gave judgment for the defendant upon the ground that the plaintiffs had failed to prove any actionable wrong, although he found that the erection of the buildings of which the plaintiffs complained had appreciably diminished the light which the plaintiffs had previously enjoyed. The Court of Appeal, as I understand their judgment, thought this was wrong, and ordered a mandatory injunction to pull the premises down, so as to restore all the light that had been previously enjoyed. If this principle should be sanctioned by your Lordships, it would be for the first time that, in this House at all events, such a principle had been determined. I do not deny that authorities may be found for it, some of which have been cited at the Bar, but I do not think that the exact question which is now in debate has ever been brought before the House until now. The question may be very simply stated thus : After an enjoyment of light for twenty years, or, if the question arose before the Act, for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period? My Lords, if that were the law it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilise their own land. Strictly applied, it would

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undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable. But if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of 45 degrees, but any appreciable diminution of light which has been enjoyed (that is to say, has existed uninterruptedly for twenty years) constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour building on his own land. My Lords, I do not think this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all; or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air, the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country, or to the top of a mountain, or even a small hill in the country; but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle. The truth is that though there were objections to ask a jury whether the enjoyment *talis qualis* was such that they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant; and if anything so extreme

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as I have just supposed were claimed, no jurymen in their senses would have affirmed such a grant. The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute literally construed by the use of the words "*the* light" would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but it is only concerned with the mode of proof. But though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your Lordships are now called upon to review. Certainly in the older decisions which have been brought to your Lordships' notice in Mr. Bray's very able argument, the proposition which, as I have said, underlies the judgment now under appeal finds no place.

Lord Hardwicke, long ago, in 1752 (*Fishmongers' Co.* v. *East India Co.*), dealing with this very question, the alleged obstruction to light, laid down what I believe to be law to-day. "It is not sufficient," he said, "to say that it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance."

Lord Cranworth, in *Clarke* v. *Clark* (1 Ch. 16), adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English Bench. I think that the whole subject has been confused by certain decisions which were dependent on the facts proved, and were incautiously reported as laying

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down principles of law, when they were in my view only intended to be findings of fact in that particular case. At all events I am prepared to hold that the test given by Lord Hardwicke is the true one, and I do not think a better example could be found than the present case to show to what extravagant results the other theory leads. The owner of a tenement on one side of a street forty feet wide seeks to restrain his opposite neighbour from erecting a room which, when erected, will not then be of the same height as the house belonging to the complaining neighbour, and the only plausible ground on which the complaint rests is that on the ground floor he has a room not built in the ordinary way of rooms in an ordinary dwelling-house, but built so that one long room goes through the whole width of the house to a back wall, a room which has no window at the back or sides, and which was therefore at the back of it too dark for some purposes without the use of an artificial light even before the building on the other side of the street was erected. I think that no tribunal ought to find as a fact that the building is a nuisance, and, altogether apart from the inappropriateness of the remedy by injunction, I am of opinion that the plaintiffs have no cause of action against the defendant. The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise, as if he lived in the country and distant from other dwellings, and yet an access of smoke, smell, and noise may give a cause of action; but in each of such cases it becomes a question of degree, and the question is in each

case, whether it amounts to a nuisance which will give a right of action. My Lords, I have not thought it necessary to enter into a discussion of the authorities, because I think it has been most carefully and accurately done by Wright, J., in *Warren* v. *Brown*. Of course, my Lords, it must be taken that the foundation of this judgment rests upon the finding of fact by Joyce, J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiffs as to amount to a nuisance. It follows that, in my judgment, the case of *Warren* v. *Brown* was rightly decided by Wright, J., and ought to have been affirmed by the Court of Appeal. It was, however, reversed in accordance with the same views which guided that Court in the case now under review. Lord Halsbury

For the reasons I have given I have to move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of Joyce, J., restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN: My Lords, the right of a person who is owner or occupier of a building with windows, privileged as ancient lights, in regard to the protection of the light coming to those windows, is a purely legal right. It is an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement. This right in early times was vindicated by an action on the case for nuisance—*Baten's Case* (9 Rep., 54A)—in which damages might be recovered and judgment had for removal or abatement of the nuisance. In *Aldred's Case* (9 Coke's Rep.: 57) Lord Coke says that an action lies for nuisance done tc light as one of the three essential requisites of habitation. "An action lies," he Lord Macnaghten

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says, "for hindrance of the light, for the ancient form of the action was significant: *sc. quod messuagium horridâ tenebritate obscuratum fuit.*" It was not every diminution of light that would support such an action. The form of the action itself shows that. In later times, when an action for the protection of ancient lights came to be regarded rather as an action for disturbance of an easement than an action grounded on nuisance—as an action to prevent the infringement of a right rather than an action to redress a wrong—the necessity of showing the gravity of the injury complained of was not so obviously apparent. Still the principle was the same, and it must always be the same. "It is not sufficient," as Lord Hardwicke observed in *Fishmongers' Co.* v. *East India Co.* (1 Dick., 163), "to say it will alter the plaintiffs' lights. The law says it must be so near as to be a nuisance." Probably the most satisfactory statement of the rule to be applied in all cases of ancient lights is to be found in *Back* v. *Stacey* (2 C. & P., 465; 31 R. R., 679 [1826]) and *Parker* v. *Smith* (5 C. & P., 438; 38 R. R., 828 [1832]). *Back* v. *Stacey* (2 C. & P., 465; 31 R. R., 679 [1826]) was an issue directed by the Lord Chancellor to try two questions: (1) whether the ancient lights of the plaintiff in his dwelling-house in Norwich had been "illegally" obstructed by a building of the defendant; and (2) if so, what damage the plaintiff had sustained in respect of the injury. So that if the jury had found that the obstruction complained of was an illegal obstruction the damages would have gone to the whole of the injury, and not merely to the loss sustained up to the date of the writ. It was contended there that, as it was evident that the quantity of light previously enjoyed had been diminished, the plaintiff was at any rate entitled to a verdict on the first issue, any obstruction of ancient lights being illegal. But according to the report, "Chief Justice Best told the jury, who had viewed the

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premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction that the plaintiff had, in fact, less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises. *Back* v. *Stacey* (2 C. & P., 465; 31 R. R., 679) was determined in 1826. *Parker* v. *Smith* (5 C. & P., 438; 38 R. R., 828) was heard during the sittings after Michaelmas Term, 1832. It is, I think, the earliest reported case dealing with the question of light after the passing of the Prescription Act, which came into operation on the first day of Michaelmas Term, 1832. It was tried before Tindal, C.J. The marginal note states accurately, I think, the effect of the decision in these words: "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation." It does not seem to have been suggested either by the counsel or the judge that the Prescription Act had made the slightest alteration in the nature of the right to light or the principle on which the question of an alleged infringement of that right ought to be determined. To these two cases I would

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only add the case of *Wells* v. *Ody* (7 C. & P., 410 [1836]), before Parke, B., in 1836. In his charge to the jury the learned judge said that he entirely adopted the law as laid down by Tindal, C.J., in *Parker* v. *Smith* (5 C. & P., 438; 38 R. R., 828). And then, after reading a passage from *Parker* v. *Smith* (5 C. & P., 438; 38 R. R., 828), he concluded his address to the jury by saying: "The question, therefore, which I shall leave to you is whether the effect of the defendants' building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." So much for the right at law. Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions. Under Lord Cairns' Act (21 & 22 Vict., c. 27) the Court was empowered, in all cases in which it had jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages to the party injured, either in addition to or in substitution for such injunction. The Act commonly known as Sir John Rolt's Act (25 & 26 Vict., c. 42) provided that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought, whether the title to such relief or remedy was or was not incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of Common Law on the determination of which the title to such relief or remedy depended, should be determined by or before the same Court. These Acts are superseded by the Judicature Act, and now the High Court has all the jurisdiction of the Court of Chancery and of the several Courts of law. But still, so far as the right in question is a legal right, the Court in the exercise of its jurisdiction *must* be

guided by the principles established at law. And those principles, in my opinion, are still to be found most clearly and most concisely exhibited in the cases before Best, C.J., and Tindal, C.J., to which I have already referred. Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. There seem to be two divergent views, neither of which, I think, is absolutely accurate. The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to a continuance of the whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. This view is conspicuous in *Calcraft* v. *Thompson* (15 W. R., 387 [1867]), before Lord Chelmsford, L.C., and in *Scott* v. *Pape* (31 Ch. D., 571 [1886]), where Cotton, L.J., speaks of a "cone of light," and Bowen, L.J., of a "specific quantity of light" as a measure of the plaintiff's right. The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes. I think this divergence of view comes from a difference of opinion, consciously or unconsciously entertained, as to the meaning and effect of the Prescription Act (2 & 3 Will. 4, c. 71), and, if I am not mistaken, it may be traced to certain expressions, not perhaps sufficiently guarded, which are to be found in judgments delivered in this House in the case of *Tapling* v. *Jones* (11 H. L. C., 290 [1865]). In that case Lord Westbury, Lord Cranworth, and Lord Chelmsford all assume that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of the period of twenty years. No doubt Sec. 3 says so in terms, but Sec. 4 must be read in connection with Sec. 3; and if the two sections are read together, it will be seen that the period is not a period in gross, but a period next

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before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question. Unless and until the claim or matter is thus brought into question, no absolute or indefeasible right can arise under the Act. There is what has been described as an inchoate right. The owner of the dominant tenement after twenty years' uninterrupted enjoyment is in a position to avail himself of the Act if his claim is brought into question. But in the meantime, however long the enjoyment may have been, his right is just the same, and the origin of his right is just the same as if the Act had never been passed. No title is as yet acquired under the Act. This point seems to have been much discussed shortly after the Act was passed. It was finally settled in a series of cases at common law, beginning, I think, with *Wright* v. *Williams* (1 M. & W., 77 [1836]; 46 R. R., 265), and including *Richards* v. *Fry* (7 Ad. & E., 698 [1838]; 45 R. R., 816) and *Cooper* v. *Hubbuck* (12 C. B. [N. S.], 456 [1862]), in which there is an interesting controversy between Willes, J., and Williams, L.J., on the question whether the twenty years' uninterrupted enjoyment under the third section is the period of twenty years before any suit or action, or twenty years before each suit or action in which the point may from time to time arise. The former construction, in which Erle, C.J., and Byles, J., concurred with Willes, J., eventually prevailed. The question is of little or no practical importance. But the construction established by the series of decisions to which I have referred, in accordance with the express language of the statute, goes, I think, a long way to show that the view taken by James, L.J., Mellish, L.J., and Lord Selborne as to the effect of the Act is absolutely correct, and that the qualification suggested by Bowen, L.J., in *Scott* v. *Pape* (31 Ch. D., 571) is not well founded. It certainly would be strange if the Court had been com-

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pelled to hold that the Prescription Act confers on a person whose right is questionable at least to this extent, that it has been actually brought into question, a higher and a larger right than that possessed by a person whose prescriptive claim to the enjoyment of light is so clear as to be beyond all question. The Act neither enlarges the right of the dominant tenement nor adds to the burthen of the servient tenement. Its effect is simply this: when the access and use of the light have been enjoyed for the full period which before the Act was supposed to be sufficient to support a prescriptive claim, and the right is then brought into question, it avoids and extinguishes every adverse plea not founded upon an agreement or consent in writing. Now, if this be so, it seems to me, in accordance with the opinion expressed by James, L.J., and Brett, L.J., in *Ecclesiastical Commissioners* v. *Kino* (14 Ch. D., 213 [1880]), and by many other judges, that the direction given by Best, C.J., in *Back* v. *Stacey* (2 C. & P., 465; 31 R. R., 679) is the direction which a Court exercising the functions of both judge and jury ought to keep steadily in view. My Lords, having come to this conclusion, I do not propose to trouble your Lordships with any comments upon the mass of cases by which, in comparatively modern times, the question has been elucidated or obscured. It is enough, I think, to refer to what was said in *Kelk* v. *Pearson* (L. R., 6 Ch., 809 [1871]), *City of London Brewery Co.* v. *Tennant* (L. R., 9 Ch., 212 [1878]), and *Ecclesiastical Commissioners* v. *Kino* (14 Ch. D., 213 [1880]). Speaking for myself, I doubt very much whether it is a profitable task to retry actions which depend simply on questions of fact, or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another

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link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett, L.J., in *Ecclesiastical Commissioners* v. *Kino* (14 Ch. D., 213 [1880]). "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration." If I may trespass for a few minutes longer on your Lordships' attention, I would rather spend the time in making one or two practical suggestions. I do not put them forward as carrying any authority. But they may possibly be of use to those who have to try such questions as this, if and so far as they appear to be consistent with good sense. It will be observed that in *Back* v. *Stacey* (2 C. & P., 465; 31 R. R., 679) the learned judge told the jury who had viewed the premises that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now a judge who exercises the functions of both judge and jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the Court does not more frequently avail itself of the power of calling in a competent adviser to report to the Court upon the question. There are plenty of

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experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in Court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor, but in my opinion the Court ought to have obtained such a report for its own guidance. Then with regard to giving damages in addition to or substitution for an injunction, that, no doubt, is a delicate matter. It is a matter for the discretion of the Court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1*s.* damages as a notice to the defendant to remove the obstruction complained of. And then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded, to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted

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fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises. The common form of injunction which has been in use since the case of *Yates* v. *Jack* (L. R., 1 Ch., 295 [1866]) is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendants' new building. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for the plaintiff's apprehension, an order, I think, might be conveniently made in that form, with costs up to the hearing, and liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised.

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With the present case I may deal very briefly. It cannot be disputed that some diminution of light is caused by the defendants' buildings; but, such as it is, I think it is exactly what Best, C.J., described as partial inconvenience rather than serious injury. I am satisfied that if the case had been tried at law, before the question was so much embarrassed by the multiplicity of decisions, no jury would have given any damages. Perhaps I ought to add a word about *Warren* v. *Brown* ([1900] 2 Q. B., 722; C. A.) ([1902] 1 K. B., 15), which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the Court of first instance or in the Court of Appeal. In the Court of first instance the learned judge who tried the case found a special verdict which is not very easy to understand. The room in which the light has been materially diminished "in its present state is," he says, "better lighted than the ground-floor front rooms in many of the principal streets." I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal, in their turn, instead of dealing with the facts of the case before them, combat a particular view which, rightly or wrongly, they attribute to Wright, J. I do not think *Warren* v. *Brown* ([1900], 2 Q. B., 722); ([1902] 1 K. B., 15) helps one much. I think the appeal ought to be allowed with costs here and below.

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Lord Davey: My Lords, I am of opinion that the finding of the learned judge who tried this action as to the facts of this case is borne out by the evidence, and I accept his finding as the basis of my judgment. After describing

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the dimensions of the room on the ground floor of the plaintiffs' premises which is used as an office, Joyce, J., says: "It is, I think, the result of the evidence that it has ordinarily, if not always, been the practice to make use of the electric light in the back part of the room, and a most extraordinary amount of light from the windows in Worship Street would be required to enable the use of the electric light in the back part of the room to be dispensed with even on ordinary days. Practically, I think it may be taken that the use of electric light or some other artificial light is now and must always be necessary in order to light the back part of the room even in the daytime. There is no evidence to show that such an extraordinary amount of light has been enjoyed or acquired for anything like the period of twenty years. Probably the ground-floor rooms were reconstructed or rearranged as they now are within quite a recent period." And the learned judge sums up his finding in these words: "Apart from any question with respect to the back part of the plaintiffs' premises and to the extraordinary light required if it be possible to be obtained so far back in the absence of illumination by electric light, the plaintiffs' premises would still, in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light—at present they have abundance of light, and are, in my opinion, unusually well lighted. If, as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed without appreciable diminution, the plaintiffs would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building if and when erected is sufficiently serious to entitle the plaintiffs to an injunction." On these findings the learned

judge, following the judgment of Wright, J., in *Warren* v. *Brown* ([1900] 2 Q. B., 722), which had not then been reversed by the Court of Appeal, held that the action failed and must be dismissed. The Court of Appeal reversed this judgment. The legal grounds of their judgment are contained in a single sentence. "If ancient lights," says Cozens-Hardy, L.J., "are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief." By the expression "interfered with substantially" I understand the Lord Justice to mean if the amount of light having access to the premises by means of the ancient lights is substantially diminished. Lord Davey

This proposition appears to me to assume or imply that the owner of the dominant tenement is entitled to have the full amount of light which has gained access to the tenement by the ancient windows during the previous twenty years maintained without substantial diminution. The "real damage" may be occasioned by an alteration in the internal structure of the dominant tenement which has been made within the period of twenty years, or its adaptation within that period to some special use for which an extraordinary amount of light is required; but, nevertheless, if the proposition be sound, the owner or occupier of the tenement is entitled to be protected in the enjoyment of the light required for his altered premises or for the special use to which he has put them. In perfect consistency with this view of the law, Vaughan Williams, L.J., expressed a doubt whether the rule of 45 degrees can any longer be applied even as a rough measure. The question for your Lordships to determine is whether this view of the law is correct, or, in other words, what is the true nature and extent in English law of the easement of light. It must be regretfully admitted that the numerous decisions on this subject in the Courts are not easily reconcilable,

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and are not infrequently contradictory. No judgment of this House has been referred to, except that in the case of *Tapling* v. *Jones* (11 H. L. C., 290), the decision in which does not directly affect the point now before your Lordships. I do not propose to travel through the long *catena* of authorities. They were copiously referred to at the Bar, and the principal cases are stated and carefully analysed in the judgment of Wright, J., in *Warren* v. *Brown* ([1900] 2 Q. B., 722).

My Lords, you will find that in the earliest authorities this obscuration of light to a tenement having ancient lights is dealt with on the footing of a nuisance. In *Aldred's Case* (9 Coke's Rep. : 57) the "hindrance of light" is treated in the same category as the nuisance of fouling the air by pigsties. In *Fishmongers' Co.* v. *East India Co.* (1 Dick., 163) Lord Hardwicke said: "As to the question whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of their lights, and whether the plaintiffs' lights will be darkened, I will not determine it here, for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. But I am of opinion that it is not a nuisance contrary to law, for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the City, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground." Consistent with this view is the direction of Best, C.J., to the jury in the case of *Back* v. *Stacey* (2 C. & P , 465; 31 R. R., 679), which is not necessary for me to quote at length. In *Clarke* v. *Clark* (L. R., 1 Ch., 16) Lord Cranworth stated the question thus: "Whether the obstruction is such as to deprive

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the party of such a supply of light as he might reasonably calculate on enjoying." After saying that the plaintiff's rooms were rendered less cheerful, he adds: "But I cannot think that this is such an obstruction of light as to amount to a nuisance. What the plaintiff is bound to show is that the buildings cause such an obstruction of light as to interfere with the ordinary occupations of life. In *Robson* v. *Whittingham* (442 L. R., 1 Ch., [1866]), decided in the following year, Knight Bruce and Turner, L.JJ., expressed themselves as entirely satisfied with Lord Cranworth's judgment, and Turner, L.J., accentuated his approval by saying that he thought this class of cases had been carried too far before the decision in *Clarke* v. *Clark* (L. R., 1 Ch., 16) was pronounced. Nothing that I can say will add to the respect and authority which the opinions of those two learned and experienced judges must command with your Lordships. It has been thought that the third section of the Prescription Act (2 & 3 Will. 4, c. 71) altered substantially the previously existing law as to ancient lights, and had the effect of conferring on the owner of the dominant tenement, by twenty years' enjoyment, an absolute and indefeasible right to the full amount of the light enjoyed during that period. And it must be admitted that the language of the section lends some plausibility to that opinion. It is, however, not consistent with the language of Lord Cranworth in *Clarke* v. *Clark* (L. R., 1 Ch., 16), and the point was expressly determined by James and Mellish, L.JJ., in *Kelk* v. *Pearson* (L. R., 6 Ch., 809), decided by them in the year 1871. James, L.J., there says: "I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the

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comfortable use and enjoyment of that house as a dwelling-house, or for the beneficial use and occupation of the house if it were a warehouse, shop, or other place of business. That was the extent of the easement, a right to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and convenient." The statute, in fact, has only altered the conditions or length of user by which the right may be acquired, but not the nature of the right. In the case of *City of London Brewery Co.* v. *Tennant* (L. R., 9 Ch., 212), Lord Selborne expressed his complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson* (L. R., 6 Ch., 809), correcting some impressions which might have arisen from the language used in former cases by some learned judges. This doctrine, however, has not been unchallenged. In an Irish case of *Mackey* v. *Scottish Widows' Society* ([1877], Ir. Rep., 11 Eq., 541), decided in 1877, Christian, L.J., criticised in vigorous language the judgments of James, L.J., and Lord Selborne, and held that the right is to an average maximum of the light which nature has been shedding upon the window for twenty years before the defendant interrupted it. It is also difficult to reconcile the language used by Cotton and Bowen, L.JJ., in the case of *Scott* v. *Pape* (31 Ch. D., 554), or the language of the Queen's Bench judges in *Moore* v. *Hall* ([1878] 3 Q. B. D., 178), with the decision in *Kelk* v. *Pearson* (L. R., 6 Ch., 809), and *City of London Brewery Co.* v. *Tennant* (L. R., 9 Ch., 212), though the authority of those cases was not in terms questioned by them.

My Lords, I regard the decisions in *Kelk* v. *Pearson* (L. R., 6 Ch., 809) and *City of London Brewery Co.* v. *Tennant* (L. R., 9 Ch., 212) as complementary to, and on the same lines with, Lord Cranworth's judgment in *Clarke* v. *Clark* (L. R., 1 Ch., 16); and so regarding it, I entirely

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approve of it. Romer, L.J., however, in delivering the judgment of the Court in *Warren* v. *Brown* ([1902] 1 K. B., 15) seems to have taken a different view of the effect of *Kelk* v. *Pearson* (L. R., 6 Ch., 809). He says: "Since *Kelk* v. *Pearson* it is impossible to hold properly that the statutory right is not interfered with merely because after the interference the house comes up to a supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business," and he quotes some words used by Mellish, L.J., at p. 814 of the report.

I must remark that the particular point which was under discussion in *Warren* v. *Brown* ([1902] 1 K. B., 15), and in another form in the present case, was not before the Court in *Kelk* v. *Pearson* (L. R., 6 Ch., 809). There was no question there of a claim for protection in the use of an extraordinary amount of light required for some special purpose, or required by some unusual peculiarity in the internal structure of the building. And I regard what was said by Mellish, L.J., as directed to the arguments addressed to the Court in that case. According to any standard short of holding that the right is to all the light which has come through the window, the right to light has a ragged edge to it, and it is impossible to assert that any man has a right to a fixed amount of light ascertainable by metes and bounds. I do not think that Mellish, L.J., intended to differ from James, L.J., and in *City of London Brewery Co.* v. *Tennant* (L. R., 9 Ch., 212), when James, L.J., repeated the substance of what he had said in the earlier case, Mellish, L.J., according to the report, contented himself with a simple concurrence. My Lords, I must trespass on your indulgence for a few moments by adverting to an impression which has been entertained by some distinguished judges, and was the subject of argument at the Bar, to the effect that within the space of a few months

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Lord Cranworth overruled himself. The judgment in *Clarke* v. *Clark* (L. R., 1 Ch., 16) was delivered on November 25, 1865, and that in *Yates* v. *Jack* (L. R., 1 Ch., 295) was delivered on March 24, 1866. It was thought by Lord Chelmsford in *Calcraft* v. *Thompson* (15 W. R., 387) that the effect of the later case was to hold the dominant tenement entitled to the whole light that had previously been enjoyed, and Wood, V.C., in *Dent* v. *Auction Mart Co.* ([1866] L. R., 2 Eq., 238) to a certain extent shared the same impression. There is not a hint in the judgment in *Yates* v. *Jack* (L. R., 1 Ch., 295) which indicates that Lord Cranworth thought he was departing from the law as laid down in his earlier judgment. Both cases were decided and probably reported before *Robson* v. *Whittingham* (L. R., 1 Ch., 442); but the Lords Justices, as we have seen, adopted *Clarke* v. *Clark* (L. R., 1 Ch., 16) as an authority which had their approval. And if the question at issue in *Yates* v. *Jack* (L. R., 1 Ch., 295) be looked at, it will be seen that the argument to which Lord Cranworth's judgment was directed was that it was not necessary for the plaintiffs to have the ordinary quantity of light because the business which they were carrying on required a diminished quantity only. That was the argument to which Lord Cranworth could not accede. So understood, and reading it by the light of *Clarke* v. *Clark* (L. R., 1 Ch., 16), I do not dissent from the language used by Lord Cranworth in *Yates* v. *Jack* (L. R., 1 Ch., 295). The right conferred by the statute is an absolutely indefeasible right to the enjoyment of the light without reference to the purposes for which it has been used. Your Lordships were told, and my experience at the Bar confirms it, that the order made in *Yates* v. *Jack* (L. R., 1 Ch., 295) has been adopted as a common form of order in cases of this description. I think this is unfortunate. It was a very proper order to make in that case, and in nineteen cases out of

twenty, or perhaps ninety-nine out of one hundred, where no question arises such as that in the present case, it would be sufficient and appropriate. But it is an erroneous proceeding to deduce an absolute rule of law from the form of an order made in a particular case. In *Lanfranchi* v. *Mackenzie*, Malins, V.C., held that a person could not, by using the dominant tenement for a period less than twenty years for some special purpose requiring an extraordinary amount of light in excess of what was required for the ordinary purposes of inhabitancy or business, entitle himself to protection for such extraordinary requirements, and thereby impose an additional restriction on his neighbour's use of his own land. In that case, as in the present one, it was not proved that the extraordinary amount of light had been used for twenty years. "No man," said the Vice-Chancellor, quoting the words of another judge, "can by any act of his own suddenly impose a new restriction on his neighbour." In their judgment in *Warren* v. *Brown* the Court of Appeal dissented from this decision, and their opinion was a logical conclusion from the views which they expressed as to the nature and extent of the easement. My Lords, I do not concur with the opinion of the Court of Appeal, for I think that the case of *Lanfranchi* v. *Mackenzie* was rightly decided. I agree with the Vice-Chancellor that it would be contrary to the principles of the law relating to easements that the burden on the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, and if the building retains its substantial identity, or if the ancient lights retain their substantial identity, it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alteration which may be made in the internal structure of it. I do not propose to discuss at length the question how far a variation in a tenement will

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destroy an easement appurtenant to it. The law on that subject is as old as Luttrell's case.

In the case of *Martin* v. *Goble* a malthouse had been converted into a workhouse, and it was held that the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. That case has been the subject of much criticism, and I think that some judges have thought that the language of the Lord Chief Baron had a wider scope than it was intended to have. Following the suggestion of Wood, V.C., it may be supported on the ground that (to use the language of Luttrell's case) the alteration affected the substance and not only the quality of the tenement.

But while agreeing that a person does not lose his easement by any change in the internal structure of his building or the use to which it is put, and that regard may be had, not only to the present use, but also to any ordinary uses to which the tenement is adapted, I think it is quite another question whether he is entitled to be protected at the expense of his neighbour in the enjoyment of the light for some special or extraordinary purpose. It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. If that measure be by common law or by the statute the whole amount of light which has had access to his windows, *cadit quæstio*. But if this view of the law be not accepted, you must introduce that "supposed standard" which Romer, L.J., repudiates. If the actual user is not the test where the use falls below the standard of what may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard? It does seem to me unreasonable to hold that where a man for his own con-

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venience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour. If the action be brought a month before the change it would be dismissed. If it be brought a month afterwards an injunction would be granted. I am of opinion that the Courts have gone too far in this question of lights, and have imposed undue restrictions on persons in the exercise of their lawful right to build on their own land.

In the second argument before your Lordships the leading counsel for the respondents contended that his clients had for more than twenty years enjoyed the access of light over the appellant's land to their ground-floor office in its present condition. I believe that all your Lordships are agreed with Joyce, J., that there is no proof to support such a contention. The fact relied on was not put in issue at the trial, and the evidence was not directed to it. If the plaintiffs had intended to claim and rely on a special easement of that description, it was for them to state their claim and prove the facts to support it. It is unnecessary to say, therefore, whether such a claim would be good in law. Malins, V.C., thought it could be sustained if the special user was had with the knowledge of the owner of the servient tenement. I will only say that I see some difficulties in the way and reserve my opinion.

My Lords, I must apologise for the length at which I have trespassed on your attention. According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a

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quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of this tenement, does not affect the question. The actual user will neither increase nor diminish the right. The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance. I do not myself think that this rule is difficult of application in practice. In the majority of cases no such questions as those which have been raised in *Warren* v. *Brown* and the present case occur.

The experience of surveyors who are practically conversant with this matter is entitled to great respect.

As Mr. Vigers states in his evidence, they have adopted a working rule for the purpose of advising those who consult them and settling differences by negotiation. The rule of 45 degrees is not, of course, a rule of law, and is not applicable to every case. But I agree with Lord Selborne (*City of London Brewery Co.* v. *Tennant*) that it may properly be used as *primâ facie* evidence.

For these reasons I think the appeal should be allowed, and the decree of Joyce, J., restored with costs here and below.

Lord Robertson

LORD ROBERTSON: My Lords, I agree in the judgment which my noble and learned friend (Lord Davey) has just delivered.

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LORD LINDLEY: My Lords, Joyce, J., who tried this case and was asked to grant an injunction before the defendant's buildings had been erected, considered that, although the buildings would sensibly diminish the plaintiffs' light, the diminution would not materially affect their comfort or convenience, and would not be sufficient to entitle the

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plaintiffs to any relief, and he dismissed their action. The Court of Appeal, however, took a different view, and granted a mandatory injunction ordering the defendant to pull down part of his building which had been completed after the injunction had been refused. Hence the appeal to your Lordships.

The language of Sec. 3 of the Prescription Act (2 & 3 Will 4, c. 71) shows that in order to acquire a right to a light there must be—(1) Access and use of light, not access alone. Access here is understood to refer to free passage of light over the servient tenement (see *per* Fry, L.J., in 31 Ch. D., p. 575, and *per* Kay, J., in 40 Ch. D., 26). (2) Such access and use must be to and for some dwelling-house, workshop, or other building (as to which, see *Harris* v. *De Pinna*). (3) Such access and use must be actually enjoyed therewith. (4) Such enjoyment must be without interruption for twenty years. (5) If all these are proved, the right to the access and use of light so enjoyed becomes absolute and indefeasible, unless it can be explained by some deed or writing.

Pausing here for a moment, it will be observed that the statute does not in terms confer a right to light, but rather assumes its acquisition by use and enjoyment, and declares it to be "absolute and indefeasible."

Again, your Lordships will observe that nothing is said about enjoyment as of right; and notwithstanding Sec. 5 of the Act, which refers to enjoyment as of right, it was early decided that as regards light claimed under Sec. 3 enjoyment as of right need not be alleged or proved, and that the right, whatever it may be, is acquired by twenty years' use and enjoyment without interruption and without written consent. (See *Truscott* v. *Merchant Taylors' Co.* and *Frewen* v. *Phillips; Simper* v. *Foley* and *Harbidge* v. *Warwick.*) This was not so under the old law.

As regards use and enjoyment, there are some instruc-

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tive decisions on unfinished and uninhabited houses, and on windows kept closed by shutters. These decisions show that a right to light may be acquired in respect of a house which has stood for twenty years without being occupied or even finished, so as to be fit for occupation; and that the fact that shutters have been closed for some months at a time does not prevent the acquisition of a right to light through the windows. (See *Courtauld* v. *Legh*; *Cooper* v. *Straker*; *Collis* v. *Laugher*; *Smith* v. *Baxter*.)

These decisions did not, however, turn upon or settle with any precision the amount of light to which a right is acquired by twenty years' user. Nor is the statute clear upon this point. At one time it appears to have been considered that in all cases the size and situation of the aperture through which light had come for twenty years formed both the maximum and minimum measures of the right acquired, without reference to the use and enjoyment of the light which had so come. This view was based on some observations made by Lord Westbury in *Tapling* v. *Jones*, and on Lord Cranworth's judgment in *Yates* v. *Jack*, which I will notice presently. Lord Chelmsford took the same view in *Calcraft* v. *Thompson*.

But this view was emphatically negatived by the Court of Appeal in Chancery in *Kelk* v. *Pearson*, *City of London Brewery Co.* v. *Tennant*, and *Leech* v. *Schroeder*. In *Moore* v. *Hall*, however, both Mellor and Manisty, JJ., adopted the interpretation thus repudiated; but it does not appear that they were aware of the repudiation.

Kelk v. *Pearson* shows that in ordinary cases a person does not necessarily acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required.

There can be no doubt that Lord Cranworth's language

in *Yates* v. *Jack*, and the head-note to it, and the form of injunction granted, have been regarded as authorities for the view that in all cases the statute confers a right to all the light which has come to a window for twenty years; and there are passages in the judgments of Cotton and Bowen, L.JJ., in *Scott* v. *Pape*, which support the same view. This is to be regretted, as it has tended to unsettle the rule laid down in *Kelk* v. *Pearson*. Lord Lindley

The decision in *Yates* v. *Jack* did not, however, really go so far as has been supposed, for the plaintiff's windows were darkened to such an extent as to render the plaintiff's house much less convenient for purposes of business than it was before. The case did not turn on the mere fact that some diminution of light was proved. The plaintiff's right to light was clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes. If these facts are borne in mind, nothing will be found in the actual decision which conflicts with the views previously expressed by Lord Cranworth in *Clarke* v. *Clark*, and adopted by the Court of Appeal in the cases already mentioned.

The common form of injunction in these cases is that adopted in *Yates* v. *Jack* and *Dent* v. *Auction Mart Co.* It is to restrain the defendants from erecting any building so as to obstruct the free access of light to the ancient windows of the plaintiff, as such access was enjoyed previously to the taking down of the house which formerly stood on the site of the defendants' new buildings.

This form is framed upon the supposition that the plaintiff has established his right to the amount of light which he, in fact, enjoyed before the obstruction complained of. But it by no means follows from the form that everyone is entitled to an injunction who can prove that he has been deprived of some of the light which he, in fact, had

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before it was interfered with. He may have had more than he can acquire a right to have preserved in future. I am, however, under the impression that this inference has been drawn, and that the form has been regarded as strengthening the view of the law repudiated in *Kelk* v. *Pearson.*

So to regard the form is, in my opinion, a mistake. The doctrine laid down in *Back* v. *Stacey*, as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk* v. *Pearson* and *City of London Brewery Co.* v. *Tennant*, and must, I think, be taken as finally established, and as good sound law which your Lordships should adopt, notwithstanding the observations in the Irish case of *Mackey* v. *Scottish Widows' Co.* That doctrine, as stated in *City of London Brewery Co.* v. *Tennant*, is that, generally speaking, an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation" introduce elements of uncertainty; but similar uncertainty has always existed, and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement.

If a more absolute standard had been adopted in all cases, certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive on the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which,

in fact, diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for. Lord Lindley

The decision in *Kelk* v. *Pearson* has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. If there is no right of action, *à fortiori* there is no right to an injunction to prevent a permanent diminution of light unless it amounts to a nuisance. But, in considering what is an actionable nuisance, regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people; and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for a diminution of light if only his special requirements are interfered with. Some important decisions will be found as to nuisances to persons carrying on delicate trades, or requiring more comfort or freedom from annoyance than ordinary people, in the cases of *Walter* v. *Selfe*, *Crump* v. *Lambert*, and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*; and as to the character of the neighbourhood, see *St. Helen's Smelting Co.* v. *Tipping*.

The expression "right to light" is sanctioned by the Prescription Act, and is convenient; but its use is apt to lead to error and to forgetfulness of the burden thrown on the servient tenement. This burden, however, ought

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never to be lost sight of in considering the extent of the right claimed in respect of the dominant tenement.

But the adoption of the more flexible standard of comfort and convenience has introduced difficulties of a serious nature, especially when dealing with places of business; and it is not surprising that different views on this subject should have been taken, and that the decisions upon it should be inconsistent with each other. That they are inconsistent is apparent from the careful review of them by Wright, J., in *Warren* v. *Brown.*

In applying the rule laid down in *Kelk* v. *Pearson* it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is, not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people. (See *Dent* v. *Auction Mart Co.*) Too much weight may have been given by Wright, J., to the amount of light left in *Warren* v. *Brown*, and this may explain the reversal of his decision by the Court of Appeal.

There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window (*Theed* v. *Debenham*). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial damage is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well. The late Lord Justice Cotton pointed this out in *Ecclesiastical Commissioners* v. *Kino.* See also *Parker* v. *First Avenue Hotel Co.*

As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James, V.C., in

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Dyers' Co. v. *King*, the light from other quarters and the light the obstruction of which is complained of may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account. (See the case just cited.)

The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired. If he chooses in future to use a well-lighted room or building for a lumber-room for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required. *Aynsley* v. *Glover* is in accordance with this view. But if a room or building has been so built as to be badly lighted, the owner or occupier cannot by enlarging the windows or altering the purpose for which he uses it increase the burden on the servient tenement. *Martin* v. *Goble*, where a malthouse was turned into a workhouse, may, I think, be upheld on this principle; and the observations of Wood, V.C., on *Martin* v. *Goble* in *Dent* v. *Auction Mart Co.* support this view.

Coming now to the present case, I am clearly of opinion that no injunction, and certainly no mandatory injunction, ought to have been granted. Joyce, J., was asked for an injunction and he refused it, and, in my opinion, quite rightly. He came to the conclusion that, although there would be a sensible diminution of light and some inconvenience to the plaintiffs, yet they had not established by twenty years' user a right to all the light which they had had, and that the obstruction complained of would not amount to an actionable nuisance, and so infringe the plaintiffs' right. The Court of Appeal, taking a different

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view of the amount of light to which the plaintiffs were entitled, reversed this decision, and ordered a partial demolition of the buildings erected by the defendant. For the reasons already given, I have come to the conclusion that this was wrong.

I should stop here were it not that I feel very strongly that in any view of the case it was not one for a mandatory injunction. I am convinced that, even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small; and to grant a mandatory injunction in such a case as this would be unduly oppressive, and not in accordance with the principles on which equitable relief has been usually granted. See *Curriers' Co.* v. *Corbett*, *Robson* v. *Whittingham*, and *National Provincial Plate Glass Co.* v. *Prudential Assurance Co.*, in all of which an injunction was refused, although the plaintiffs' legal right had been infringed. In *Warren* v. *Brown* the Court of Appeal only gave damages. The present case is eminently one in which damages would be an adequate remedy, even assuming the plaintiffs could prove a small nuisance for which some damages could be properly given; and where that is the case an injunction, and especially a mandatory injunction, ought not to issue. The general rule that where a legal right is continuously infringed an injunction to protect it ought to be granted is subject to qualification, as was carefully explained by Sir George Jessel in *Aynsley* v. *Glover*, and more recently by the Court of Appeal in *Shelfer* v. *City of London Electric Lighting Co.*

My Lords, the result of the foregoing review of the authorities is not altogether satisfactory. The general principle deducible from them appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance, and that an action for the obstruction of light which has in fact been used and enjoyed for twenty years without interruption or written

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consent cannot be sustained unless the obstruction amounts to an actionable nuisance; and this often depends upon considerations wider than the facts applicable to the complainant himself. There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies. Lord Lindley

In this case the Court of Appeal have, in my opinion, gone too far, and the appeal ought to be allowed with costs here and below.

Kine v. Jolly (1907), A. C. 1.

The respondent having brought an action against the appellant for obstructing the respondent's ancient lights, the case was twice tried before Kekewich, J. The first trial has no bearing upon the present appeal. On the second trial Kekewich, J., found as a fact that the obstruction amounted to a nuisance, and ordered the appellant to pull down the obstruction. But he said that the room of which the main complaint had been made was still a well-lighted room. The Court of Appeal (Vaughan Williams and Cozens-Hardy, L.JJ., Romer, L.J., dissenting) varied that decision by reversing the order to pull down, and directed an inquiry as to damages (see [1905] 1 Ch., 480). Hence the present appeal.

Hughes, K.C., and W. E. Vernon, for the appellant, laid great stress on the observation of Kekewich, J., in his

judgment that the room in question was still a well-lighted room, and contended that the finding of fact as to a nuisance was contrary to the evidence, and that the decision of Kekewick, J., was inconsistent with the principle of *Colls* v. *Home and Colonial Stores.*

P. O. Lawrence, K.C., and W. M. Cann for the respondent.

Hughes, K.C., in reply.

The House took time for consideration.

Lord Loreburn, L.C.

LORD LOREBURN, L.C.: My Lords, this appeal relates to an alleged interference with lights. The law on this subject has been laid down in this House in the case of *Colls* v. *Home and Colonial Stores, Ltd.*, and I understand it to be as follows: The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke, in 1752, in *Fishmongers' Co.* v. *East India Co.*, that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded. In applying the doctrine of this case to the present litigation, I have felt much difficulty. Kekewich, J., adopted, as it appears to me, a perfectly sound view of the law, and in dealing with the facts he found that what would amount to a nuisance was proved. But he said that the room of which the main complaint had been made was "still a well-lighted room." This statement might seem inconsistent with the finding. I think he must have meant that it was well lighted, not according to the standard to be expected in the actual locality and surroundings, but according to the standard of a crowded city. I find that distinction drawn in Mr. Pratt's

evidence, and I think the learned judge had that passage in his mind when he spoke of a well-lighted room. Kekewich, J., evidently accepted the evidence of Mrs. Reid and Mr. Virgoe, which established a nuisance. I attach the greatest importance to the opinion on such a matter of the learned judge, who had the advantage of observing the witnesses; and as that opinion has been supported by two out of three members of the Court of Appeal, I cannot think it would be safe for your Lordships to reverse this judgment on a pure question of fact. I desire to add my profound regret that in a matter comparatively small such enormous costs have been incurred. Lord Loreburn, L.C.

LORD JAMES OF HEREFORD: My Lords, I concur in the judgment delivered by the Lord Chancellor. The questions raised in the case had in the first instance to be determined by Kekewich, J. He had to resolve questions of fact after hearing evidence, and then to direct himself as to the law controlling the facts he found. I think that the judgment of Kekewich, J., should be taken to be represented by its substance more than by detailed expressions. I take it that the learned judge intended to accept the decision of your Lordships' House in *Colls* v. *Home and Colonial Stores.* He commences his judgment by saying: "This has to be considered on the lines of the recent decision in the House of Lords"; and he then proceeds, I think, to apply the principle established by Colls' case to the one before him, and he finds that the obstruction caused to the plaintiff's light amounts to a nuisance. It is true that Kekewich, J., uses some words that have been much discussed in argument. He said: "I am convinced that the character of the room is altered, and that, though still a well-lighted room, it has lost in the obstruction of light one of its chief charms and advantages." It was urged that the words "still a well-lighted room" brought the alleged cause of action within the judgment in Colls' case, and so deprived the plaintiff Lord James

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of any right to recover compensation. But the words are relative in their character, and I do not think that the learned judge by employing them intended to bring the case within your Lordships' previous decision, still less to set that decision at defiance.

Cozens-Hardy, L.J., so reads Kekewich, J.'s, words, for he says: "In the present case I think it is clear that the learned judge held that the letting and selling value of the house has been affected by the defendants' building, and he has also certainly found that the comfort and convenience of the occupier have been affected by it. That being so, there is nothing, I think, in the decision in Colls' case which in any way prevents me from arriving at the conclusion which I propose to adopt. Is it any answer to say that the room is still a well-lighted room? I think not if the building makes the room less fit for occupation, and I do not think that we can bring in the phrase 'according to the ordinary notions of mankind' to cut down the effect which would otherwise result from a building of this nature. I, for my part, accept the findings of fact of Kekewich, J. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned."

Vaughan Williams, L.J., seems to concur in this construction put on Kekewich, J.'s, words. For my own part I so read them, and, having carefully gone through the evidence, I think the finding of the learned judge as construed by Cozens-Hardy, L.J., was correct. I submit to your Lordships that this appeal should be dismissed.

Lord Robertson

LORD ROBERTSON: My Lords, I find it impossible to reconcile the judgment under review with the law laid down by this House in the case of Colls. The facts are of the simplest, and the photographs present the relative positions of the two houses with complete perspicuity.

Kine v. *Jolly.*

Lord Robertson

The only room in the house on which the respondents founded their case is pronounced by the learned judge who tried the case to be in its condition "a well-lighted room." The real truth of the case is that the respondent had the singular good fortune to enjoy for a very long time an uninterrupted view and an amount of light correspondingly exceptional for a suburban villa. The inmates of her house, quite naturally, feel keenly the effect of a detached villa being built beside them, and compare their existing light, not with the ordinary light of such houses, but with their own former and favoured condition. Accordingly what the trial judge founds on is the diminution of the "charm," "advantage," and "cheerfulness" of this room, and the resulting change in its "character." Now, if it were the law that in twenty years a proprietor loses the right to build on his own ground in any way which diminishes the charm, advantage, and cheerfulness of a room in his neighbour's house, the appellant must submit to this curtailment of his rights. But the case of Colls is entirely negative of the view that the effect of twenty years is to prescribe a right to continue to enjoy in all time the measure of light, *tantum et tale*, as it existed during the period of possession. The very matter of diminished cheerfulness has been dealt with by Lord Cranworth long before the case of Colls, and his judgment was there approved. His Lordship had held this not to amount to a nuisance. The standard or measure of right is quite different, and has been defined by this House in Colls.

I adhere, as I did in Colls' case, to the definition given by Lord Davey (in entire accordance with the judgments of the other noble and learned Lords). According to that definition the quantity of light to which right is acquired in twenty years is "what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind." My Lords, when a

legal question of this kind has been deliberately and unequivocally decided by this House, I do not think that it is desirable to re-discuss the question or to express in other words the rule laid down, for this would be merely to afford fresh topics of controversy. The facts of the present case seem to me to admit of no doubt, and the judgment appealed against to be wrong.

Lord Atkinson

LORD ATKINSON: My Lords, the parties in this case are the owners or occupiers of two adjoining plots of land forming portions of a building estate situate at Acton, in the county of Middlesex, a rapidly developing surburban residential district. The deed under which the respondent claims shows in the map attached to it that it is bounded on the west by the building plot of the appellant. Both plots front the Acacia Road, and are substantially of the same extent. The appellant recently erected upon his plot a house not much higher than that built on the respondent's plot, and situate so near the eastern boundary of the plot as to leave only a passage between the house and the boundary 10 feet wide. By building this house the appellant, it is alleged, has obstructed the light which formerly entered a certain room of the respondent's house, called the morning-room, through its western window; and it is to this obstruction the action in the case is now practically confined. The room in question is a small room, 13 feet 8 inches long by 13 feet 7 inches wide, and has two windows of the same glass area, 27 feet 7 inches, the one facing north and the other west. The northern window is entirely unobstructed. The eastern wall of the appellant's house subtends an angle, measured from the base of the western window of the respondent's house, of less than forty-five degrees; but there can be no doubt that much of the direct western sunlight which formerly entered through the western window of the morning-room is now obstructed, and that that room is thereby rendered less light

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and cheerful than formerly. Kekewich, J., was of opinion that this brightness and cheerfulness was "one of the chief charms and advantages of the room," and, as I understand, found as a conclusion of fact that the room had been an exceptionally well-lighted room, and that it is now, notwithstanding the obstruction, a well-lighted room. And by way of commentary on or explanation of this latter finding he states that if the test were "whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question." It would appear to me, therefore, that this second finding of fact must have been intended to amount to, and at all events must be taken to amount to, this, that there is still admitted through the windows of this room an amount of light sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of the room as a sitting-room, or for its comfortable use and enjoyment as a room devoted to any of the other purposes of habitation to which, as a part of the respondent's dwelling-house, it might reasonably be devoted. I entirely accept those findings of fact as so understood, but I cannot concur with the learned judge in the statement that, according to the judgment of your Lordships' House in the case of *Colls* v. *Home and Colonial Stores*, the sufficiency in the sense above mentioned of the quantity of light left for the enjoyment of the owner of the dominant tenement is not a test. It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L.J., in *Kelk* v. *Pearson*, is "sufficient according to the ordinary notions of mankind for the

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comfortable use and enjoyment" of his dwelling-house, or of the room in it, as the case may be, no nuisance has, as regards him, been created, and no legal wrong has been inflicted upon him. Of course, in determining whether or not the quantity of light which the owner of the dominant tenement will, after the obstruction complained of, continue to enjoy is sufficient within the meaning of this decision, regard can only be had to the light which that owner is by grant or prescription legally entitled to enjoy; and light which may with impunity be at any time obstructed, windows which may at any time be almost entirely blocked up or altogether darkened, must necessarily be left out of consideration. This is the rule laid down in the case of *Kelk* v. *Pearson*. In *City of London Brewery Co.* v. *Tennant*, James, L.J., at p. 216, in giving judgment, is reported to have said: "In the case of *Kelk* v. *Pearson* the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases, and I believe the Lord Chancellor entirely agrees with the mode in which it is there expressed"; and Lord Selborne, at p. 218, is reported to have said: "First of all, I wish to express my complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson*, correcting some impressions which might have arisen from the language used in former cases by some learned judges." It would appear to me to be perfectly clear that the rule laid down in *Kelk* v. *Pearson* was also approved of by the noble and learned Lords who took part in the decision of Colls' case. Lord Macnaghten refers to it; so do Lords Davey, Robertson, and Lindley refer to it, and each with approval; and Lord Halsbury does not dissent from it.

For myself I may say that I do not think there is any logical halting-place between the position of the learned judges who founded their decisions on the old doctrine of the proprietary right of the owner of the dominant tene-

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ment to the continued enjoyment, without sensible diminution, of all the light he enjoyed for the twenty years immediately preceding the interruption complained of and that taken up by the learned Lord Justice in *Kelk* v. *Pearson.* And now that the old doctrine has in Colls' case been declared to be an erroneous doctrine, the old position taken by those who adopted and acted upon it must necessarily be abandoned, and the only alternative open is to apply rationally but resolutely the rule and principle founded on the very earliest authorities, and now reasserted and re-established by the recent decision of your Lordships' House. In my opinion, on the findings of facts of Kekewich, J., to which I have referred, this case falls within this latter rule, and is covered by this latter principle. I therefore think that the judgment of Romer, L.J., was right, and that the decision of the Court of Appeal was wrong and should be reversed. The respondent's counsel pressed upon us in argument that Lord Davey, in the passage so often quoted from his judgment in Colls' case at p. 204 of the report, was only dealing with a case in which an extra quantity of light was necessary for some special purpose and had been theretofore enjoyed for that purpose. I do not think that contention is well founded ; to me Lord Davey's remarks appear to be of general application.

We now come to consider the matter, as all surveyors must do, with reference to the evidence we must submit to the judges, and the methods of calculation which now obtain. First of all, we have to disabuse our reader's mind that the angle of forty-five degrees, although by many considered a good test, is one not recognised by the Courts (see preceding paragraph). This will be emphasised by perusing the following cases, and also by referring to the judgments in *Ecclesiastical Commissioners* v. *Kino* (14 Ch. D., 213).

Lord Selborne, in *City of London Brewery Co.* v. *Tennant* (9 Ch., 212 [1874]), after stating that, with regard to the forty-five degrees, there was no positive law upon that subject, and that the circumstance that forty-five degrees were left unobstructed was merely an element in the question of fact whether the access of light was unduly interfered with, held that there was "undoubtedly ground for saying that if the Legislature, when making general regulations as to building, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury."

The question again came under consideration by the Master of the Rolls in *Hackett* v. *Baiss* (20 Eq., 494). The plaintiff in that case was the owner of extensive messuages in Jewry Street, in the City of London, the owners and occupiers of which had uninterrupted enjoyment of light far beyond twenty years. The defendants were erecting a warehouse opposite to the plaintiff's premises, on the site of some old buildings, part of which only subtended an angle of thirty-eight degrees, and other part an angle of seventy-two degrees, above the horizon at the centre point of the ground windows of the plaintiff's houses. The defendants desired to build their warehouse 52 feet high, and had it carried up to the height of 46 feet, which subtended an angle of more than forty-five degrees at the foot of the plaintiff's ancient lights, by about 1 foot or 1½ feet. His Lordship said, "The real question I have to decide is this: In a street a good deal narrower than ordinary streets, not being more than 38 feet 6 inches at any point across, and other parts only 34 feet, is a building owner entitled to erect a building to a height which will obstruct the access

of light below the forty-five degrees angle? I can say that, as a general rule, he is not. In cases of this kind, positive evidence being unobtainable because the building is not erected, you must go upon theory, and that theory, of course, must be the opinion of skilled persons—persons who have paid attention to the effect of buildings on light. But on this point the Court is not left to guess or to arrive at an arbitrary conclusion upon the evidence of witnesses, because, in the first place, the point has been considered by the Legislature; and after considering the result of professional opinions, the Legislature has adopted the angle of forty-five degrees as the proper angle, below which the incidence of light ought not to be permitted to fall, in the case of buildings on the opposite side of an ordinary street; and that view has been sanctioned by the Court, whose decisions are binding upon me if I differed from them, which I do not." And after referring to *City of London Brewery Co.* v. *Tennant* (9 Ch., 212 [1873]), his Lordship proceeded: "So that on being satisfied that forty-five degrees are unobstructed, I ought, *prima facie*, to come to that conclusion, unless there is something special in the case. Now, what is special in the case is in favour of the plaintiff. In the first place, as I have said, the street is rather narrower than it ought to be. The legislative rule applies to a street of the ordinary width. In the next place, there is some positive evidence that the present height of 46 feet, a little over forty-five degrees, has interfered with the access of light not to an inconsiderable extent, and has actually caused personal inconvenience to one of the occupiers of the houses. I do not say that that alone would be conclusive.

"I cordially assent, if any assent were necessary, which it is not, to the remarks made by Lord Cranworth in the case of *Yates* v. *Jack* (1 Ch., 295 [1866]). I think it is no answer to say, because for sampling in some business it is better that the direct rays of the sun should not enter

into the room, that therefore you may deprive a man of the blessing and comfort of the entry of the direct rays of the sun. If he does not like the sun entering when he is going to sample, he can pull down his blind, or otherwise regulate the access of light. There are other times of the day when his room would be more cheerful, more comfortable, and more enjoyable with the sunshine, especially in a city like London, where we do not see quite so much as we should like of the direct rays of the sun. That is no answer at all. It is not conclusive upon the point, and, so far as it goes, is in favour of the plaintiff. That being so, I shall grant an injunction.

"It is a very serious matter to decide what the terms of it ought to be. I have sent for the order in *Yates* v. *Jack* (1 Ch., 295 [1866]), which I have read. It is not necessary that the whole subject-matter in dispute should be fought out in a most inconvenient or disagreeable form, upon a formal motion to commit the defendants for breach of the injunction. Nothing, in my opinion, can be more undesirable; but, at the same time, it is impossible for the Court to say beforehand what kind of building would obstruct the light. The defendants may wish to alter their plans, and if they do so wish, the Court, *à priori*, cannot say whether the plans when altered will or will not be objectionable to the plaintiff; therefore in that case the Court has no alternative. It has, therefore, been my habit to ask the defendant what form of injunction he prefers; and I believe in every case the answer has been the same as Mr. Chitty has given to-day—namely, that he prefers an order which tells him exactly what he is not to do. I will grant an injunction to restrain the defendants from erecting the new building at a greater height than 46 feet from the pavement or base line. This, however, is not to prevent the defendants making a sloping roof of a greater height, so long as the angle of incidence of light over the roof to the centre of the ground-floor

windows of the plaintiff's house does not exceed forty-five degrees."

How little the angle of forty-five degrees can be relied on is shown by the case of *Theed* v. *Debenham* (2 Ch. D., 165 [1876]). It will be seen that the rule as to forty-five degrees was rejected by the Court.

This case was not in terms dissented from in *Colls* v. *Home and Colonial Stores*, and there may be cases where although more than forty-five degrees is left, yet under the particular circumstances of the case there may be an actionable nuisance.

Having now set out fully the various methods by which you cannot estimate the damage, nor obtain interlocutory, perpetual, or mandatory injunctions, we have to consider how we are to make our estimate, and for this purpose we set forth the matters necessary to be considered in the following Table :—

TABLE VI.

Matters to be considered in estimating Damage or Injury to Ancient Light and Air.

1. QUANTITY OF DAYLIGHT LOST.
   This should be estimated at different periods of the year, because the value of light will differ. For example, take an office in the City. The loss of daylight in the summer, when probably it would be after *office hours*, would be of little consequence; but the loss in winter, when it would occur during the office hours, and would thus necessitate the inconvenience and cost of artifical light, would of course have a different value.
2. IF FOR ALL THE TIME IT HAS EXISTED IT HAS BEEN USED FOR THE PARTICULAR PURPOSE: IF NOT, FOR WHAT OTHER PURPOSE.
3. HOW FAR THE ENJOYMENT OF THE PREMISES IS AFFECTED.
4. HOW FAR, BY ALTERATIONS OF DOMINANT OWNER'S PREMISES, THE DIMINUTION OF LIGHT MAY BE AVOIDED.
   In case this can be effected, it will be necessary to make a careful estimate of the cost of these works, and the

quantum of inconvenience they would occasion to dominant owner. This may be set out in the defence, and may influence the jury in assessing the damage; but it must be remembered that in law the dominant owner cannot be required to alter his premises.

5. WHETHER THE QUANTITY OF LIGHT AND AIR IS SO FAR DIMINISHED AS TO RENDER THE ROOM OR PREMISES UNHEALTHY FOR OCCUPATION.
6. HOW FAR THE INJURY TO DOMINANT OWNER'S PREMISES MAY BE REDUCED by the use, in building servient owner's obstruction, of white glazed bricks, or facing it with white tiles or other material.

In using Table VI., it must be remembered that in considering whether an obstruction to ancient lights amounts to an actionable nuisance the test is not whether so much light has been taken away as materially to lessen the enjoyment and use of the premises that its owner previously had, but whether so much is left as is sufficient for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind.

To the experienced practitioner there is little difficulty in pronouncing a confident opinion, after a careful inspection of the premises or drawings, as to whether the obstruction will constitute a nuisance having regard to the decided cases.

It may be well to set out here the legal opinion as to the different amounts of money injury which justify the different methods of procedure.

We will next discuss the remedy, whether an injunction ought to be granted, or merely damages. It is advisable to consider what Lord Macnaghten said in Colls' case, viz. "that if the defendant has acted fairly and not in an unneighbourly spirit, the Court ought to incline to damages rather than to an injunction." This makes it incumbent on architects and surveyors advising clients to do all that they reasonably can in order to see whether the case cannot be settled on a money basis. For an injunction is a much

more serious matter, and if granted may seriously handicap a defendant in developing or rebuilding his property. An injunction nevertheless will be granted if the injury cannot be adequately met by damages. This remedy will likewise be granted if the defendant has acted in a high handed manner, or if he has evaded the jurisdiction of the Court, or misled or tried to steal a march on the plaintiff.

1. **Quantity of daylight left.**—We have so fully gone into this question that we need say no more here than that we would advise the surveyor, in estimating the *quantum* of daylight, to free himself from "party ties," and look at the matter as a practical man. By such means will he be able to give his client what in the end must prove to be the best and soundest advice, remembering that the main question to be decided is not how much light is actually left, but whether there is a diminution of light amounting to an actionable nuisance.

Next we would mention a case in which we were engaged for the plaintiff, where we obtained £500 damages, and one of the items of the claim was that dispensing could not be carried on with the same accuracy and rapidity as before.

2. **If used for same purpose during period of acquirement.**—It is wise to obtain this information, because it has been held that the light is only protected for the purpose for which it has been enjoyed, or is reasonably adapted to be enjoyed. (See *Martin* v. *Goble*, 1 Campb., 320; *Dent* v. *Auction Mart Co.*, L. R., 2 Eq., 238.) The ground of this has been that there can be no substantial injury, if a man can enjoy his premises for the same purposes as he has hitherto enjoyed them. But it must be borne in mind that a person does not lose his right by any change in the internal structure of his building or the use to which it is put; and that regard may be had, not only to the present use, but also to any ordinary uses to which the tenement is adapted.

3. **How far enjoyment of premises is affected.**—It is well to bear in mind the words of Lord Justice Romer in *Warren* v. *Brown* ([1900] 2 Q. B., 722), that, "It is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put."

4. **How far diminution of light may be avoided.**—While, as we have shown, the dominant owner cannot be compelled to alter his premises, it may still be a great advantage to be able to show how it can be done, and the cost; for in some cases we have been concerned in, on the dominant owner having it shown to him that such alterations could be effected, and upon our offering on behalf of our clients to do the necessary works, the matter has been arranged. It seems fair to say, "We are sure you do not wish to injure your neighbour by preventing him making the most he can of his land, when by certain alterations, which will not cost you anything, your premises can be just as comfortably enjoyed." Our experience is that it is the exception to find people determined to litigate, and that in the early stages a professional man can often arrange differences in a satisfactory manner.

In the Table other reasons appear why it is desirable.

5. **Whether premises are rendered unhealthy for occupation.**—Where it can be shown that the premises are not merely injured as to enjoyment, but are rendered unhealthy, of course a much stronger case is presented. It is not often that such can be shown; still, there have been cases where the "ventilation" has been affected by premises being built in, as it were, so that no rays of sun can reach the building, and little air. A typical case of this kind was in Spital Square, where the dominant owner, a medical man, claimed heavy damages for loss of the sun's rays. This case is alluded to, and has diagrams to illustrate it, in Chapter VI. of this work.

6. **How far injury may be reduced by use of materials reflecting light.**—Much stress is sometimes laid on the method of building with white glazed bricks, or facing with white glazed tiles, or the advantage of reflectors of various kinds. It is well, therefore, to consider these points, and to form an opinion of their value, remembering that the fact of the use of such materials would indicate that some damage to light is intended.

CHAPTER V.

THE TRIAL.

REFERENCE—"LEGAL MIND"—BIASSED VIEWS TAKEN BY SOME ARCHITECTS—PREPARATION OF CASE AT LAST MINUTE—CONSULTATION WITH BROTHER PROFESSIONALS—THE TEAM—NON-SKILLED EVIDENCE—TABLE VII., WHAT DOMINANT OWNER MIGHT TRY TO PROVE—TABLE VIII., POINTS FOR SERVIENT OWNER TO INQUIRE INTO.

UNFORTUNATELY, even in this age of compromise, some clients will contest their rights by "trial of battle," the only difference being the "venue," which is now in the Courts of law.

At times it is unquestionably necessary to have recourse to law; but we think it is always wise to endeavour to arrange these questions, and for this purpose, no doubt, a meeting between the surveyors of the dominant and servient owners is the usual course of proceeding. But at such meeting it may be found either the dominant owner has such an exaggerated opinion of the value of "light and air," or the servient owner such an unappreciative idea of its value, that no course is open but to appoint an impartial umpire, or to take the case to trial.

Now, as to a *reference*. Although there is much to be advanced in its favour, it appears sometimes to be difficult to persuade clients to adopt this method of settling these questions; partly, may it not be, because the proceeding is so quiet, and there is still a lingering love of the olden times wherein a man was proud to declare he would fight for his rights.

We would here remark that we cannot help thinking, however, that references to members of our profession would be much oftener made if our awards were given more quickly, and were based on deeper study of the law, so that those who submitted their cases to us would have the assurance that no prejudice, towards either all dominant owners or all servient owners, existed in our minds. We know how difficult it is to imbue oneself with legal and logical feelings, and we therefore strongly recommend our readers to make a study of legal works; and we can assure them that after a time they will find such study not nearly so dry as they may imagine it to be. Read reports of all trials bearing on this and all kindred subjects; never lose an opportunity of listening to, and discussing questions with, counsel and solicitors. Of course, in doing so we need hardly mention that one must remember that one is a *layman*.

To show that our advice as to endeavouring to obtain what is called a "legal mind," distinguished by impartiality, is necessary, we need only quote the following as indicating its absence:—"I do not find architects so ready to keep to the defendant's side as I think they ought to be. I say it plainly. If a man comes to me with a defence, I take it up without inquiring any further; but if he comes to me as the plaintiff, or representing him, I must have it investigated before I will take it up at all. I will venture a little further, and say my experience has led me to this: that in nine cases out of ten these actions about light and air are based upon something very different from the sense of having suffered injustice. I state that deliberately and advisedly as my experience; and I think that if architects would do as I suggest—take up a defendant's case with alacrity, but take up a plaintiff's case with very considerable hesitation—they would not have to complain, as they do most justly, of the obstacles which are placed in the way of improving London and other large towns by these

most mischievous actions." And again: "But if architects would hesitate a little more to come forward as witnesses against the business of brother architects, less harm would be done. 'Love me, love my building!' and those who put obstacles in the way of honest building ought not to be able to get architectural evidence to support their cases." This quotation is from the Transactions of the Royal Institute of British Architects, and we leave our readers to refer thereto to find who was the speaker. Surely such a bias is not worthy of a great reputation.

Well, we will now assume that all efforts at a settlement have failed, and you are instructed to prepare for the trial. Of course, for whichever side you are, either the dominant or servient, it matters not; your duty is clearly to do the best you can for your client, and if you cannot honestly support his case, throw it up at the outset, so that he may take other opinions. In the preparation of your case it is wise to be prompt; in fact, taking a leaf out of the solicitor's book (who engage counsel at once, so as to secure the best advice for the especial case), you should at once secure an expert who has given such cases his special study, and who, from practice in giving evidence, is not likely to fail in the witness-box. You will consult with him and be advised by him, as to whether you have any cause of action or defence as the case may be. And he will, no doubt, view with you the premises, and suggest to you the kind of drawings or models you should prepare, and the evidence you should get ready; and if the case is complicated, no doubt it will be to your client's interest that an early meeting should take place with his solicitor.

Rest assured that you cannot too early have everything prepared; for, in any negotiation during the legal proceedings, you have all your strong points ready to advance, and you will know how to indicate the weak portions of your opponent's case, and will, therefore, be more likely to obtain favourable terms in any settlement for your client.

It is an old adage that "good wine needs no bush"; yet, after long experience, we venture to affirm that a good case is only "half the battle," and that many good causes are lost because they are not properly explained by diagrams, and are not thoroughly and clearly prepared for counsel and the Court. If such were not the case, why should solicitors be so anxious, in the interests of their clients, to secure the leading men at the Bar in the "specialty" by which they have made a reputation?

Nothing pleases one more than to find one's opponent very sanguine—to hear him talk of his case in the horsy phraseology as a "walk over"; nothing pleases one less than to hear one's own side using the same expression; as, from long experience, we have found the expression is used too frequently by those who have not considered what can be advanced by the other side—who, in fact, have not weighed the *pros* and *cons* carefully, or who are prejudiced in their clients' case (which they have made so thoroughly their own as to be incompetent to guide their clients judiciously), or have some case in their mind not at all on all-fours with the case in hand. Thus, they are rendered unfit to form a judicial and impartial decision.

That a surveyor should consult a brother professional in a difficulty appears to be the rational proceeding. Again, is there not a great advantage in having a fresh and experienced mind brought to bear on the subject, which, from its being constantly before you, has only the side turned towards you that you have so long and so wearily contemplated?

The next question is as to the "team," as it is called. We confess we prefer a few leading men to a larger number of lesser weight; and for the following reasons:—1. Good men carry most weight. 2. As they are often appearing in the witness-box, they are less likely to answer awkward questions stupidly. 3. Men unaccustomed to this ordeal are nearly sure to say something that they will admit they

never meant in the sense the cross-examining counsel intended. 4. Because one witness breaking down or giving (through the misunderstanding of the question, in consequence of the nervousness attending his position) a wrong answer destroys, at least, two of your good witnesses—in fact, may entirely spoil your case.

While on this portion of the subject, we ought to call attention to other than skilled witnesses. They comprise builders; inhabitants of the premises of the dominant and servient owners; assistants and shopmen; gentlemen who pursue the same profession or trade; persons who have known the premises before and since the injury alleged, including that not-to-be-got-rid of individual—the oldest inhabitant.

Now, in dealing with this non-skilled evidence, it is very difficult, first, to obtain from the witnesses, before they go into the "*box*," what they know (because they sometimes tell rambling stories, the date and pith of which it is difficult to discover); and when under clever cross-examination they seem to be so liable to forget what they have told, or their memory is so quickened by that trying process, that they say something for which you are quite unprepared, and which they tell you they had quite forgotten, or that they had become "fogged" and did not mean it.

You will assume that we incline to mature skilled witnesses. We affirm that they are less likely, under cross-examination, to say what they do *not* mean; but, of course, other evidence is often imperative, and we would only suggest that such evidence should be produced for what it is required, and that the professional, skilled, or technical evidence should be relied on as to injury or non-injury.

The main points to consider we have endeavoured to express in the following Table. It sets out what the dominant owner will seek to prove, and if you are acting for the dominant owner, you will try to prove some or all of them.

TABLE VII.

Showing what the Dominant Owner may try to Prove.

The dominant owner will, no doubt, after proving his right to the easement, try to prove some of the following items :—

1. That his Easement is by Prescription, and that his Enjoyment of the Premises is interfered with.
2. That his Light is not slightly affected, but injured in such a manner as to amount to a nuisance within the meaning of the cases.
3. That he cannot carry on his Business as heretofore.
4. That he cannot carry on his Business with the same Convenience as heretofore.
5. That he cannot carry on his Business without aid from Artificial Light.
6. That his Premises are rendered Unhealthy and Unfit for Habitation.
7. That the Rental Value is seriously diminished.
8. That the Selling Value is seriously affected.

Should these points, 7 and 8, be taken, it will be wise for the surveyor to be prepared with evidence and proof as to *quantum*.

1. Of course, the dominant owner must first prove that the light is an ancient light; secondly, that the enjoyment is interfered with; and to do so he will produce, probably, occupants, if the claim be in respect of a private residence, and the employés, if the premises be a shop or warehouse. In the former case, it is likely that it will be contended that serving cannot be done as late in the day, or that some one accustomed to use the needle cannot thread it without artificial light so many hours later in the morning or earlier in the evening. As to the latter, that colours cannot be distinguished at all, or cannot be distinguished after a certain time in the day in the summer and a certain

time in the day in winter; that dispensing cannot be carried on so conveniently or safely; that the shop is dingy and dark, and is rendered less attractive; that the premises are rendered less healthy by reason of the necessity of gas being burned during a greater period each day.

2. We have shown in the preceding pages so clearly the necessity of proving that the injury is substantial, that it is almost certain the dominant owner's surveyor will endeavour to prove this.

3. Clearly, if this can be proved, the dominant owner will obtain relief; for the law is most jealous of allowing an injury of this kind, and certainly it is most just that it should be so.

4. We have often found much dispute as to this item, the word "convenience" seeming to have a different meaning in many witnesses' minds, although it would appear so clear.

5. It is safer ground, as it would only be necessary to show, on trustworthy evidence, that the gas has now to be lighted at an earlier hour in the day, to support this.

6. This is somewhat difficult of proof while the system of sanitation and health is so much in dispute, and probably the surveyor advising the plaintiff would do well to have what is called a strong case before advising fighting on this count. It is well to remember, however, that in the question of air this is specially an element.

7. Here the surveyor is almost the sole judge, and certainly, if he be experienced, he can most properly determine whether or not any injury to the rental value or desirability of the premises has occurred.

8. This will in all probability follow *item* 7, and surveyors are again the best and almost the only witnesses to support or rebut.

Having examined Table VII. and briefly pointed out the salient points requiring attention, we next come to Table VIII., and will follow it with a few suggestions.

TABLE VIII.

Important Points for Servient Owners to inquire into.

1. The Length of Time for which Light has been enjoyed.
2. If any, and what, Alterations have been made in the Windows, Skylights, or other Lights.
3. If any Interruption of the Light has occurred.
4. If any Alteration can be made in Proposed Building so as to give Equivalent Light.
5. If any Excess of Light exists.
   As heavy blinds would indicate.
6. The Quantity of Injury, whether it amounts to a Nuisance—
   As if only trivial the Courts will not interfere by injunction, and may at the trial dismiss the action with costs. This is important to remember.
7. The Amount of Light coming from other Sources.
8. The surrounding Obstructions (if any), and the date, if it can be obtained; of their Erection.
9. The Kind of Glass in the Ancient Light.

1. Naturally this will first engage the defendant solicitor's attention, and he will often find himself in great difficulty. Some will tell him, "Window only sixteen years old," or some number of years short of the prescribed time: and then he will have to find out why it is fixed at this time, and will discover a wedding, a birth, or death, or an accident to a child, or some such cause has impressed it on informant's mind. It will require patience to test statements and arrive at the fact, and it must be borne in mind legal proof will be necessary if this is the defence, and not merely unsupported statements.

2. We advise a careful perusal of the cases we have quoted.

These most important recent cases should certainly enable the surveyor to determine if, in the case he has to combat, he can successfully bring this item forward with advantage.

3. He will find the same difficulty as we have set out as to *item* 1, unless the interruption has taken place under his superintendence or that of some well-qualified surveyor, when no such difficulty can occur, as the date of obstruction, the watching, and the written record will be all ready for production.

4. In the preceding portion of the work we have endeavoured carefully to explain that the dominant owner cannot be compelled to alter his premises; still it is important in estimating damage, and also in showing that the injury can be diminished, to indicate what can be done to the dominant owner's premises, and what the result will be. Although it may give the plaintiff an advantage (in giving him time to consider what reply and objection he may be able to set out against the proposed alteration of his premises), still it seems only fair, before the trial, to give him plans and estimates of the proposal. It is not always a disadvantage; for the Courts are usually willing to consider leniently the case of any party who has done all he can to conciliate his neighbour, and does not want to oppose him or prepare surprises at the trial, but tells him fairly what he means to contend, and enables him, by giving him copies, to have plenty of time and opportunity of answering.

5. Many cases of this kind arise in our minds, indicating that abundance of light existed. It is, however, open to the dominant owner to combat this in several ways.

6. *Colls* v. *Home and Colonial Stores* ([1904] A. C., 179) and *Kine* v. *Jolly* ([1907] A. C., 1) as laying down the test, viz. whether so much light is left as is enough for the comfortable use and enjoyment of the premises according to the ordinary requirements of mankind so as to allow of the beneficial use and occupation of a shop, or warehouse, or other place of business.

7. One must consider how much light is left, and where it comes from; light from other sources cannot be dis-

regarded. But light to which no right has been acquired, and of which plaintiff may be deprived at any time, ought not to be taken into account. One cannot form a reliable opinion as to this unless one has the drawings of each case before one.

8. This is difficult to explain without the special case before one, and yet in many cases the surrounding obstructions, which have become ancient through consent, negligence, or accident, may give especial value to the light sought to be injured.

9. So much have we heard of this in cases in which we have been engaged, that we are bound to call attention to it. On the one side, it is contended that if a man has ground or "matted" glass, it indicates in itself that he has an excess of light, and takes that means of reducing it. On the other hand, it is contended that no such assumption is fair; that he may desire privacy, and that he is entitled thereto; that he may dislike a glare, and that this is the best remedy; that the diminution he has made to obtain one or other of these objects renders the remaining light more valuable to him; that consequently he cannot easily part with any portion of the remaining light. As to the quantity of light lost by ground, "matted," and other kinds of glass, we have dealt with the subject in our book on "Architectural Hygiene."

CHAPTER VI.

DIAGRAMS OF CASES SHOWN ON THE PLATES.

WITH regard to the preparation of diagrams for the purpose of illustrating the effect of the alleged interference to the easements of light and air, we have selected twenty-seven plates of diagrams of cases in which we have been engaged. We have found them useful for the purpose of illustrating the effect of such obstructions of the easement. It must be borne in mind that the nature of each individual case must guide us in the preparation of such diagrams as will fairly represent the actual damage or otherwise that will accrue. No hard-and-fast lines can possibly be laid down, and we merely give these diagrams in the hope that they may be of some slight service for the purpose of elucidating the subject, as in each case they were successful in either assisting to obtain a verdict, or in arriving at an adequate compromise. In all the diagrams the existing buildings are shown in black, and the defendant's proposed buildings are shown in red. The old angles of light are shown in blue lines, and the angles that would be caused by the proposed buildings in red lines.

The first case is illustrated in PLATE 1. This shows the case of *Twinberrow* v. *Braid.* The view is taken with the eye 5 feet 3 inches from the ground, and the body moved back 1 foot from the window. It will be seen that the whole sky surface on the left hand of the picture is unobscured ; on the right, uncoloured, is shown an existing obstruction of light ; in the centre is another obstruction in the shape of a chimney-stack. If the reader will refer

to PLATE 2, he will see that the sky on the left hand is completely hidden from view by the defendant's new buildings, which in this plate are hatched, and on the right hand is also a small obstruction of a chimney-stack, also shown by the hatching. It will be seen that the chimney-stack in the centre is of a different form, and, we may mention here, the defendant's surveyors made much in their affidavits of the advantage to the plaintiffs by this alteration.

Now, if the reader will work out his calculation, he will see that the loss of sky is some 60 per cent. It was so in the large drawings we produced in Court, but in the process of reducing some slight variation occurs; but it is, however, immaterial, as the sole object in view is to show the method of calculation. These plates show lateral obstruction.

Next, we have a case of the erection of buildings directly opposite dominant windows.

PLATE 3 shows a building in a narrow street, with the quantity of sky it possessed. The servient owner pulled down the opposite premises, and rebuilt his premises to a greater altitude, as shown on PLATE 4, thus diminishing the sky view by 90 per cent. The views in this case are taken from the first-floor window, with the eye at a height of 5 feet 3 inches from the floor, and the body 1 foot from the window.

To show the same building from a different point of view, we have taken the view from the ground floor,—PLATE 5 showing the view antecedent to the new building; PLATE 6 showing the new building and the result—the total loss of sky.

The special object in giving these illustrations of injury in a narrow street is to bring prominently before the reader what is so often contended by the opposite parties. By the dominant owner, that he has so little light that he cannot afford any decrease of it; that the slightest diminution is

therefore to him a far greater injury, because he has so little. By the servient owner, that the premises are already so dark that a little more or less cannot practically make any difference; that the lighting of gas a few minutes earlier is of little consequence; that if, in the crowded thoroughfares of great cities, such slight injuries gave the right to injunction, the architectural improvements of the commercial towns would cease to be carried on.

The next obstruction we will, for distinction sake, call a *distant lateral*, as in this case it will be seen from the plan given in PLATE 7 that a narrow roadway intervened, and it was contended that the greatest injury sustained was from the heightening of the buildings marked on the plan B and C.

In this case, it will be noticed, immediately opposite to the plaintiff's premises was a tall building, which is shown on the centre of the first diagram on PLATE 7, and marked D thereon; and to the right thereof is shown a view of the old building, marked A, B, C on diagram, the hatched portion showing that which was raised.

We allude to this case because a test of injury was tried of a practical character. To test whether the injunction should continue, it was suggested that a screen should be put up, with the power of raising it and lowering it at pleasure.

On the day appointed, we attended with the surveyors for the defendant, and the surveyors for the plaintiff were also present. We sat in various positions in the room on the ground floor which was stated to be most injured, one of the plaintiff's surveyors placing himself in a favourable position, with his back to the light and a newspaper in front of him. According to instructions, the screen was lowered without any notice, and raised in the same manner. The result of this test was that the defendant gained the case, with costs.

Another portion of the claim in this case was the loss of

the sun's rays. The plaintiff, being a medical man, contended that the raising of A, B, C deprived him of the sun's rays, and rendered his house unhealthy. He further contended that as his practice necessitated his living in the immediate locality, and as he could not obtain any other house adapted to his requirements in the same neighbourhood, no money could compensate him, and therefore he ought to have a perpetual injunction. A further ground for this was that his professional duties necessitated his residence therein all the year round, save only for one short fortnight. It will be seen, therefore, how strong was his claim to have a healthy house.

To prove that the buildings A, B, C shown upon PLATE 7 did not obstruct the sun's rays, we visited the premises at different periods, and made diagrams, of which PLATES 8 and 9 are reduced copies. We found that the morning's sun had uninterrupted play on the front till ten o'clock in the morning on the days of our visit. We also found what we considered an important point to call the attention of the Court to—that the whole flank wall of plaintiff's house was in direct sunshine also. At 11.50 A.M. the shadow was thrown on the house as set forth in PLATE 8; but this shadow was cast, not by the defendant's building, but by the old building marked D on plan, PLATE 7. PLATE 9 shows the shadow thrown on a different day at 11.25 A.M. Later in each day, on the different days, we attended to watch the building, but at no period was the plaintiff's statement confirmed of the shadow being thrown by the heightening of B, C.

Having dwelt with front, side, or lateral and distant lateral obstruction, we next deal with *skylights*.

In PLATE 10 we set out the view of the sky taken in the shop behind a dispensing counter, where light was admitted by both sides to be most important. At the view before the trial we had some difficulty in making the learned counsel understand what the ellipse was, as the

skylight was circular on plan; but when he had overcome the difficulty, he realised the value of the diagram.

PLATE 11 shows the same skylight, with the new buildings indicated thereon, thus showing a loss of sky of some 97 per cent. On the right of the plate we have shown the new buildings continued, and dormers which, although not visible from the point of sight, appear to have the effect of making the diagram more intelligible, and indicated a further obstruction beyond the loss of sky.

We next give a sectional diagram on PLATE 12. It will be seen that on the right hand the servient owner's wall has been raised. We show this by tinting the wall red. Now, to indicate the loss of rays, we show them by the red lines; the blue indicate the rays of light still left at this point, and the black lines shows the rays which were enjoyed, but which are now lost. The object of showing these in black is because their line would impinge on the opposite side of the framework of the skylight. It might be contended that they were of little value to the dominant owner, as he only derived reflected light therefrom. They certainly have a different value from the rays shown blue. The contention was that the red lines were of the utmost value, because they fell, as will be seen on reference to the plate, on the dispensing counter, and also on the bottles shown against the wall. It was contended that the loss of these rays (marked red) prevented accurate dispensing, and rendered the labels on the bottles illegible at the same distance at which they had been legible before.

PLATES 13 and 14 show a case in which we were called in to advise the Benchers of the Inner Temple, and in which we were of opinion that great injury would result if the Temple Chambers Company, Limited, were allowed to build according to their designs. One peculiarity of the case is that the basements of King's Bench Walk are used as offices, and therefore the light to these rooms is important.

PLATE 13 shows the back room on this floor, and the writing-table is also shown, the lines of light that would be interfered with are drawn in blue, and coloured blue inside the room. It will be seen that the rays are those which touch the table, and are therefore valuable. On the ground floor the same method of illustration is used—see PLATE 14—the table also being shown where it was the custom for it to be placed. In this case the Court granted the Inner Temple a perpetual injunction, with costs.

PLATES 15, 16, and 17 were used in *Slack* v. *Richman and Smyth*. This was a case at Wandsworth. A reference to the plan will show the side lighting of the dining and the drawing room in this semi-detached villa. More than twenty years previously the owner had built the conservatory, which is shown, and lowered the windows by removing the sills, thus making French casements.

The defence was that there was no interruption to light, because they proposed limiting the new buildings to the angle of forty-five degrees from the bottom of these casement windows, and further, as they were removing the fruit trees, there was really a benefit to the lighting of the drawing and dining room windows and to the conservatory. These obstructing trees are shown on the drawings prepared by the defendant's surveyor, PLATE 15. With regard to the basement windows, it was alleged that "creepers" covered them, and so no light could enter. We prepared PLATE 17 in reply to PLATE 16, and the verdict was for the plaintiffs.

It will interest our readers to know how rapidly sometimes cases can be tried. The writ was issued on the 20th September. The two days' trial took place, and judgment was given on the last day, 7th December. So that the whole of the proceedings were completed within three months of the issue of the writ.

PLATES 18 and 19 illustrate the position in *Aldin* v. *Latimer Clark & Co.* This form of case is somewhat rare, as it is seldom that there is an action for "air" without any claim for "light." The plaintiffs were timber

merchants, carrying on an extensive business. The defendants were erecting an electric-light works and offices.

A reference to PLATE 18 shows the position of the obstructive buildings. Counsel for the defendants endeavoured to make much of what he alleged would be the advantage of the high building in creating a narrow passage or "gut," and thus causing an increased current of air through this narrow way. This case was tried in 1893, and the verdict was for the plaintiffs with costs.

PLATES 20 and 21 were used in *Maynard* v. *London School Board*. This case was as follows:—The Board had built a school which, under their powers, they were entitled to build, and against their so doing no injunction would be granted. This power to build was not limited, we may mention, to the School Board, but is possessed by many other public bodies, including railway companies. The only remedy the injured party has is by action for "compensation."

A reference to PLATE 20 will show that the injury was somewhat lateral. The contention was that advantage had been given in exchange: first, by the setting back; and secondly by the playground at the southern end of the School Board's new building.

In the evidence for the plaintiff before the jury we pointed out that we had given all the advantage of the setting back; and with regard to the playground, that the angle on plan being only that beyond the angle on plan of sixty degrees, the quantity of light that would enter between sixty degrees and ninety degrees on plan was very small, and to that extent we had given credit.

The jury gave £100 damages, which was the sum we had advised should be taken, and costs.

PLATE 22 illustrates some of the diagrams used in the case of *Wasson* v. *Pawson & Leafs, Limited* (*Times*, 6th and 26th February 1895).

This action was brought in 1895 by the plaintiffs, who on

their writ claimed an injunction to restrain the defendants from erecting and raising their new building so as to darken, injure, or obstruct the ancient light passing to the plaintiffs' premises, and also from permitting to remain any building already erected, which should cause obstruction to the said ancient lights. The plaintiffs also claimed damages. We were the only professional advisers called for the plaintiffs, but the defendants called many experts. Mr. Justice North thought that an injunction ought to be granted till the trial of the action. But he was by no means certain that the plaintiffs would succeed at the latter.

The plaintiffs had to give the usual undertakings as to damages. This decision was appealed against, and came before the Court of Appeal, but the judgment was upheld. Lord Justice Lindley was of opinion that the judge below had understated the amount of obstruction, and that the plaintiffs had made out a strong *prima facie* case.

PLATE 23 illustrates the diagrams prepared in the matter of *Sharman* v. *Steward*. The defendant's new premises are shown by the rectangle coloured red on Plan H.P.F.[1] It will be seen from the sections that there was actually a gain of light to the plaintiff's windows on sections H.P.F.[2 and 4]. This action was tried before Mr. Justice Cozens-Hardy in June 1900, and was dismissed with costs.

PLATE 24 shows the diagrams prepared in the case of *Cookesley* v. *Lord Russell of Killowen*. Our client, Mrs. Murray Cookesley, found that the trees shown on H.P.F.[1 and 2] seriously interfered with the light to her studio, and reference to H.P.F.[3] shows that from her easel the sky was entirely obliterated.

The defendant finally agreed to an order for injunction to cut the trees back to an angle of forty-five degrees from the sill of the plaintiff's studio window, as shown by the black angle of light in H.P.F.[2]

PLATE 25 illustrates the case of *Bassano* v. *Bromet*, all the sections being taken on the line A A marked on the

plan B.F.[1] In this case it will be seen that the light to basement and ground floors of plaintiff's premises was originally somewhat obstructed owing to the bath-room on the first floor extending beyond the back front of the building, and shown in section on B.F.[2 and 3]. In these sections the loss of floor and wall space is shown in addition to the angle loss. The defendant agreed in Court to pay the sum of £200 and all costs.

PLATE 26 shows the diagrams prepared in the case of *Levy Brothers* v. *Harrison*. In this matter it was argued by the defendants that the plaintiffs had lost their easement. On H.P.F.[1 and 2] the blue portion shows the plaintiffs' new premises, and the red the plaintiffs' old building. H.P.F.[3] shows by the red rectangles the portion of the new windows that was protected by the old lights. H.P.F.[4 and 5] shows on sections to what extent this protection is accomplished. The verdict in this case was for the plaintiffs, as it was held that the new windows in their building concurred sufficiently with the easements acquired by the old windows.

PLATE 27 illustrates the case of *Brown's Executors* v. *Morris*. In this case it will be seen that the defendants desired to raise their building some 14 feet above the old height. We failed to convince their architect that they would materially damage the plaintiffs' lights, and the case was tried in 1899 in the Chancery Division, with the result that the plaintiffs obtained a verdict. We think that the diagrams fully explain the case, and it will be seen on referring to H.P.F.[10] that there was a considerable loss of light to the bulkhead lighting the plaintiffs' office, in addition to the losses to the windows on the upper floors.

INDEX.

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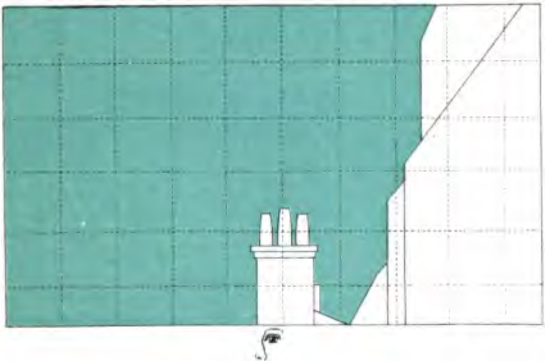
TWINBERROW V. BRAID.

AS IT WAS.

PLATE I.



VIEW TAKEN FROM 1ST FLOOR WINDOW AT A HEIGHT OF 5'.3" FROM FLOOR, 1'.0" BACK FROM WINDOW.

NOTE: THE EYE 5'.3" FROM GROUND.
THE BODY 1'.0" FROM WINDOW.

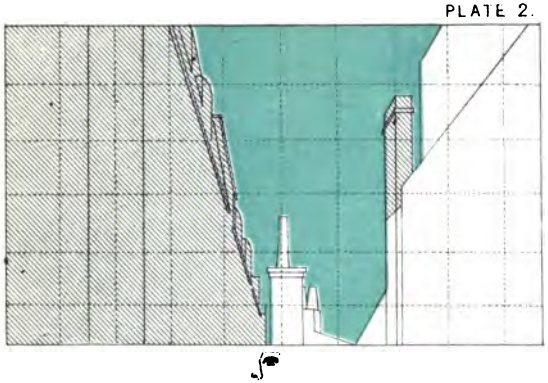
Banister Fletcher & Sons, 29 New Bridge Street, Ludgate Circus E.C. } Architects.

Whiteman & Bass Photo-Litho London

TWINBERROW V. BRAID.

AS IT IS

PLATE 2.



LOSS OF SKY 60 PER CENT.

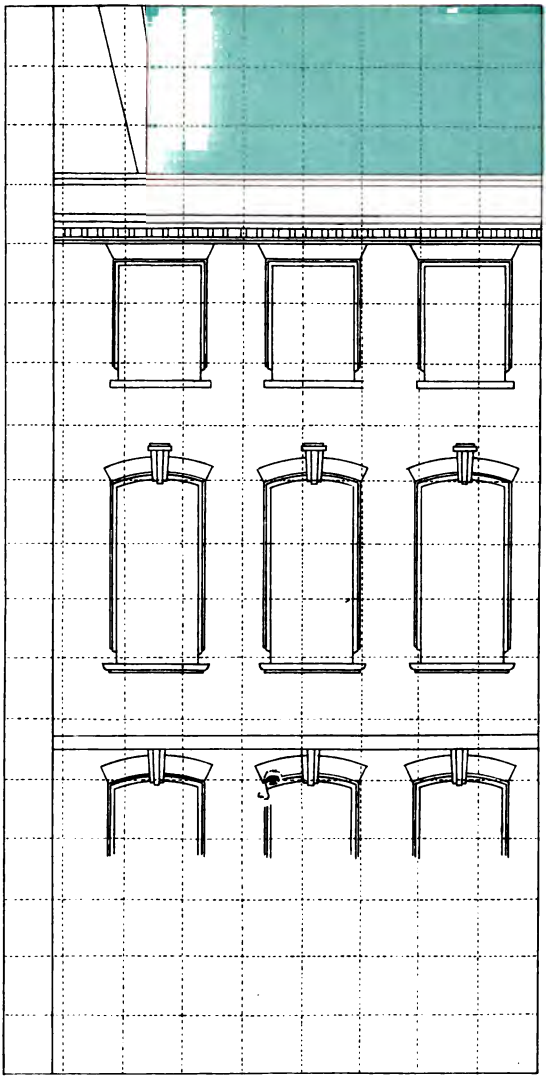
VIEW TAKEN FROM 1ST FLOOR WINDOW AT A HEIGHT OF 5'.3" FROM FLOOR, 1'.0" BACK FROM WINDOW.

NOTE: THE EYE 5'.3" FROM GROUND.
THE BODY 1'.0" FROM WINDOW.

Whiteman & Bass Photo Lith London

AS IT WAS.

PLATE 3.

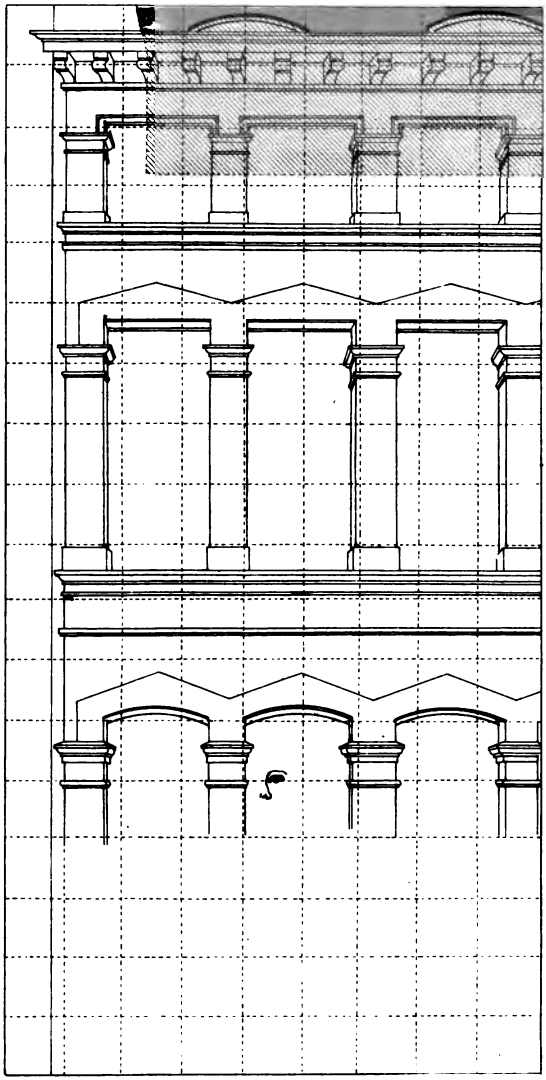


VIEW TAKEN FROM 1ST FLOOR WINDOW AT A HEIGHT OF 5'.3" FROM FLOOR, 1'.0" BACK FROM WINDOW

Chesterton, Kitchener & Jones, 20, New Broad Street, London, E.C. Architects.

AS IT IS

PLATE 4.

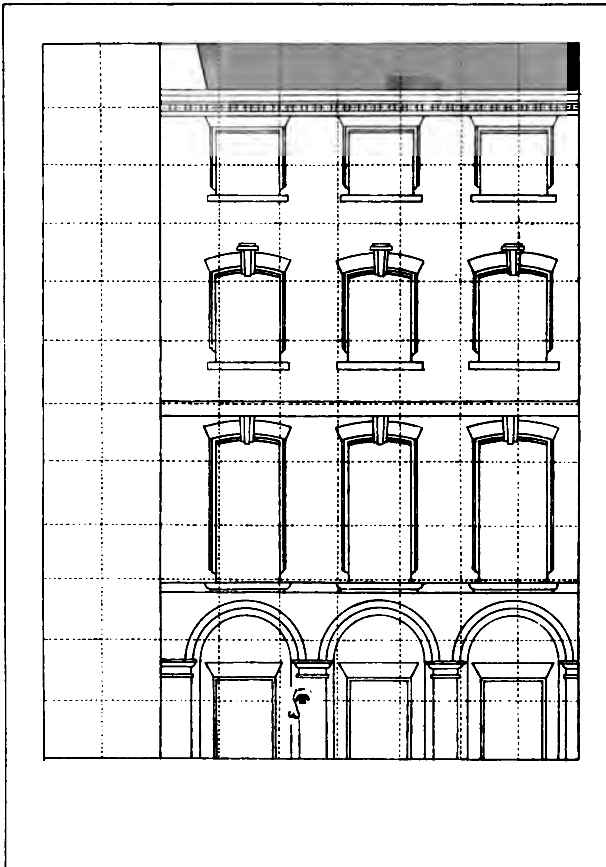


LOSS OF LIGHT 89 PER CENT.

VIEW TAKEN FROM 1ST FLOOR WINDOW AT A HEIGHT OF 5.3' FROM FLOOR. 1.0' BACK FROM WINDOW.

AS IT WAS.

PLATE 5.



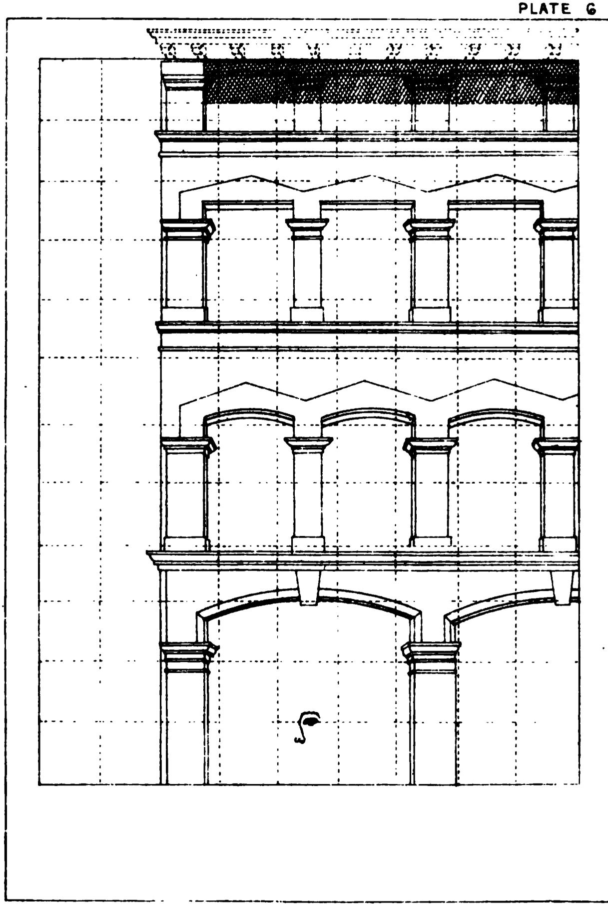
VIEW TAKEN FROM SHOP WINDOW AT A HEIGHT OF 5'.3" FROM FLOOR AND 1'.0" BACK FROM WINDOW

Banister Fletcher & Sons
29, New Bridge Street
Ludgate Circus E.C. } Architects.

Whiteman & Bass *Photo-Litho* London.

AS IT IS.

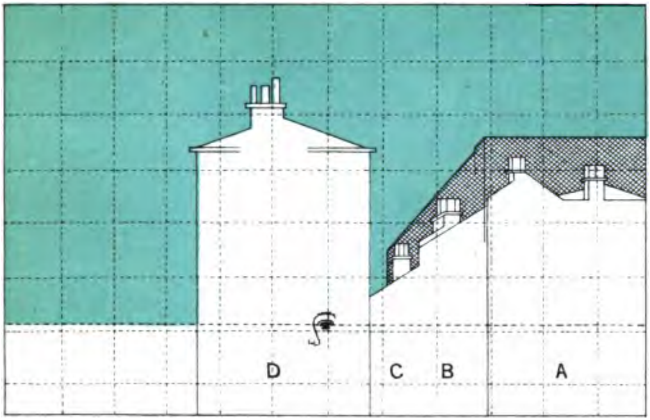
PLATE 6



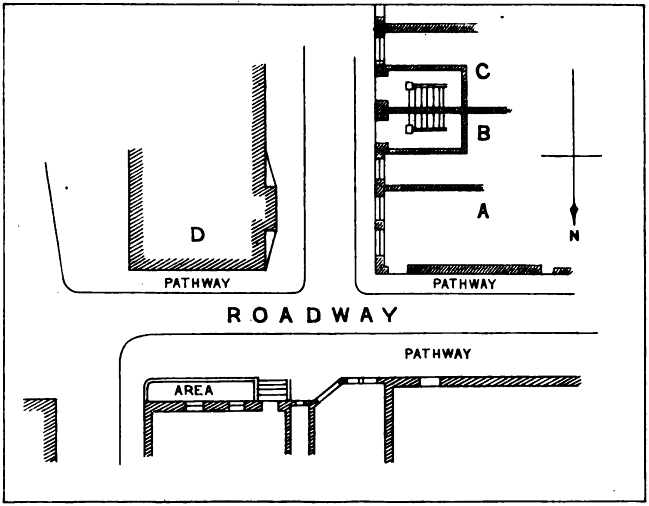
TOTAL LOSS OF SKY.

VIEW TAKEN FROM SHOP WINDOW AT A HEIGHT OF 5' 3" FROM FLOOR AND 1' 0" BACK FROM WINDOW.

[illegible] Ludgate Circus E.C. Architects.



VIEW



PLAN

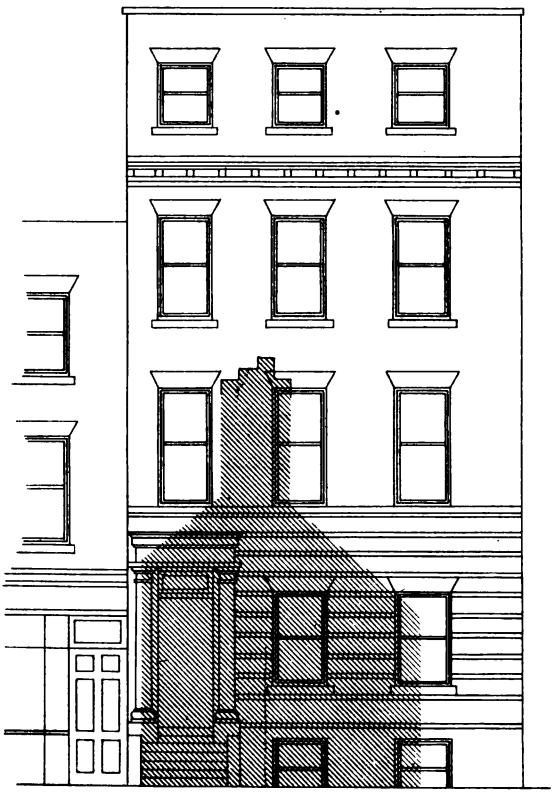
[illegible] & Sons, [illegible], New Bridge Street, Ludgate Circus E.C. — Architects.

PLAINTIFF'S PREMISES

DIAGRAM TAKEN 11.50 A.M. 1ST APRIL.

Banister Fletcher & Sons, 29, New Bridge Street, Ludgate Circus E.C. } Architects.

Whiteman & Bass, Photo Litho London.



PLAINTIFF'S PREMISES.

DIAGRAM TAKEN 11.25 A.M. 25TH APRIL.

Whiteman & Bass Photo-Lith. London.

AS IT WAS.

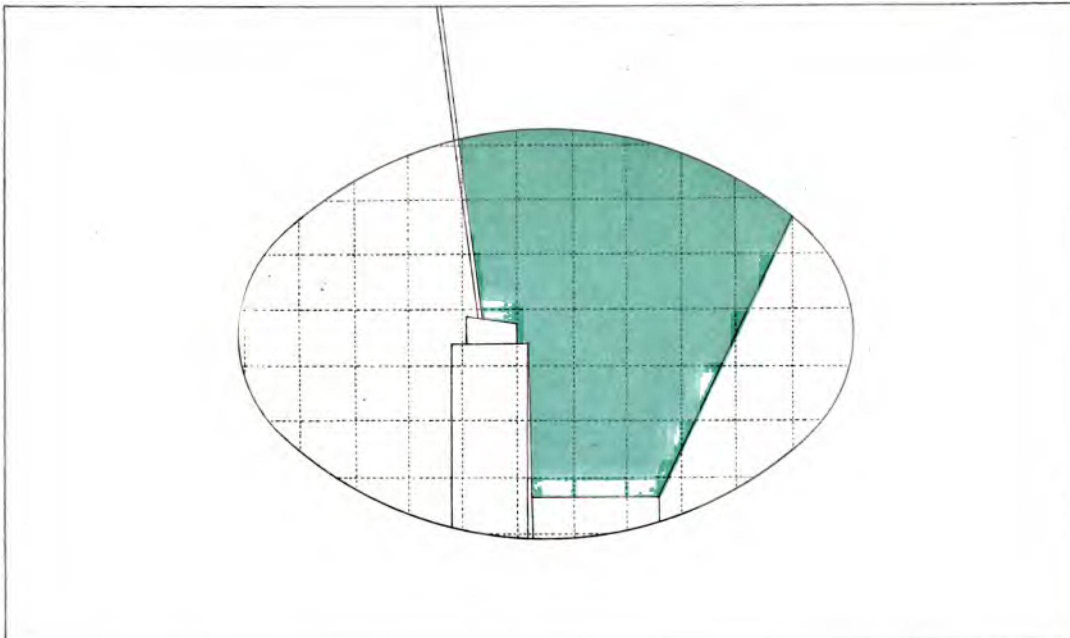


PLATE 10.

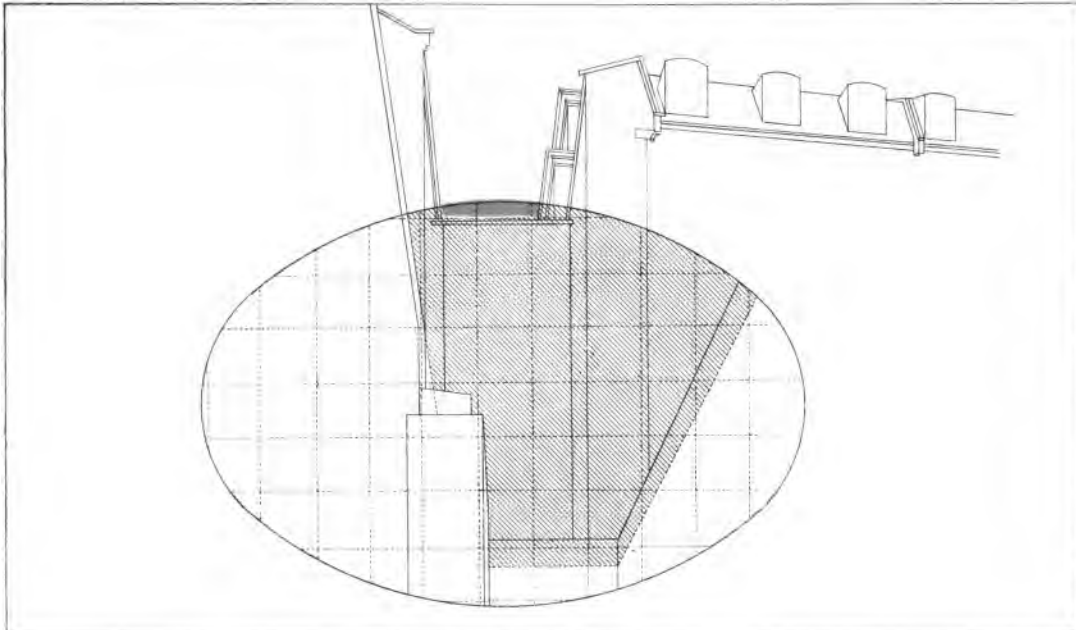
VIEW TAKEN FROM BEHIND COUNTER IN SHOP LOOKING UP THROUGH SKYLIGHT.

Whiteman & Bass Photo-Litho London.

Banister Fletcher & Sons, 29 New Bridge Street, Ludgate Circus E.C. Architects.

PLATE II.

AS IT IS.

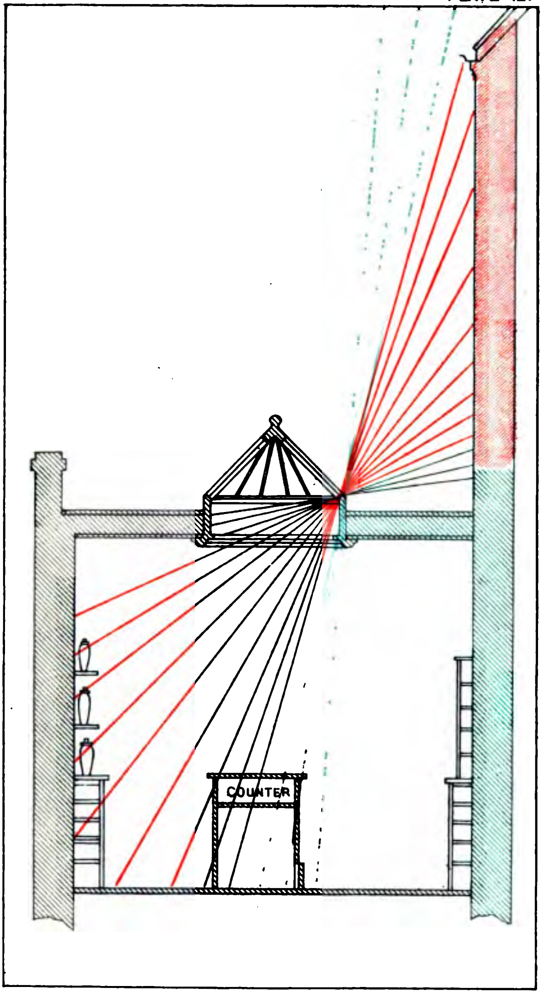


LOSS OF SKY 97⅓ PER CENT.

VIEW TAKEN FROM BEHIND COUNTER IN SHOP LOOKING UP THROUGH SKYLIGHT.

Banister Fletcher & Sons, 29, New Bridge Street, Ludgate Circus E.C. } Architects.

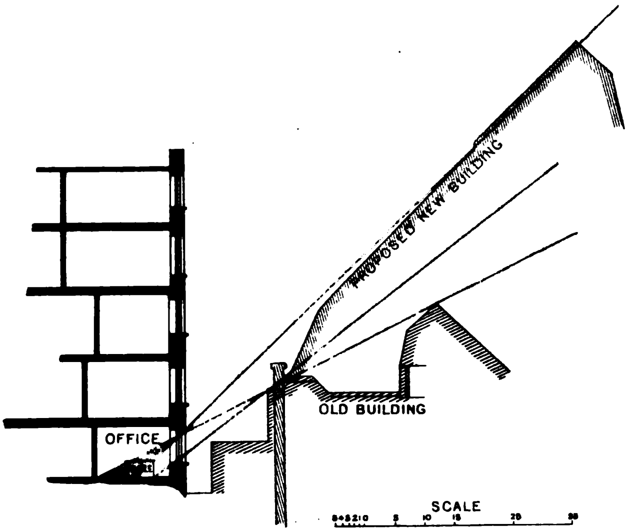
PLATE 12.



RED — LOST RAYS.
BLUE — RAYS NOT AFFECTED.
BLACK – INTERCEPTED RAYS.

SECTION

Dunster Fletcher & Sons, 20, New Bridge Street, Ludgate Circus E.C. } Architects.



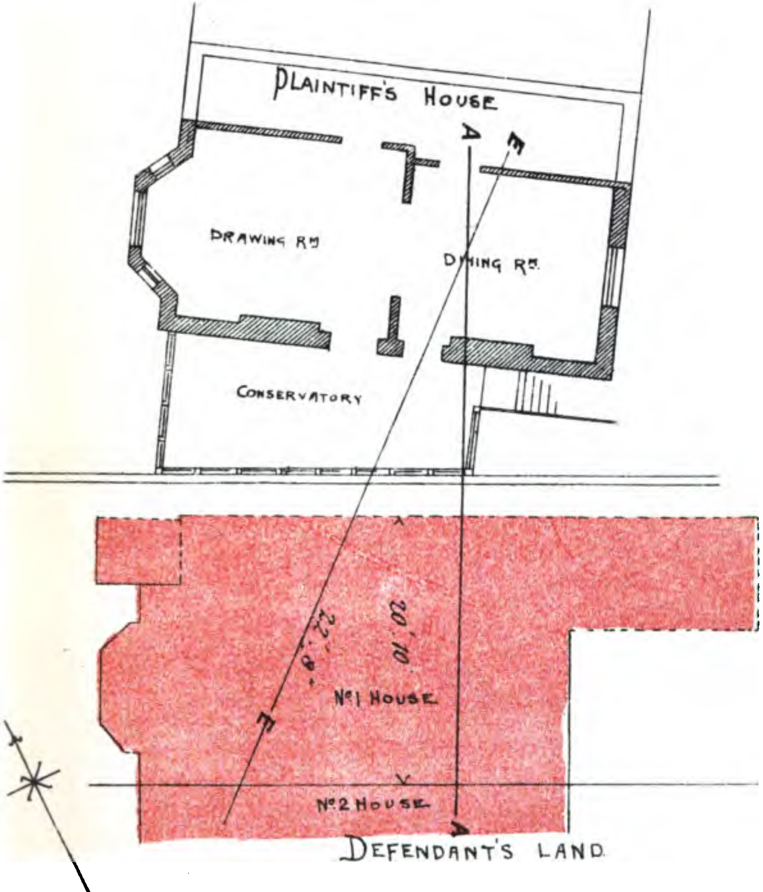
No. 7 KING'S BENCH WALK

SECTION

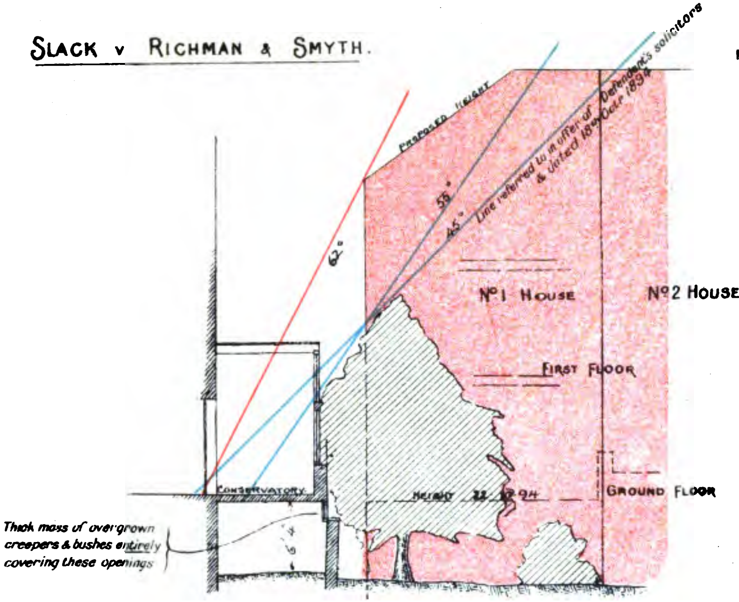
THE BLUE LINES SHEW THE LINES OF LIGHT INTERFERED WITH.
THE RED LINES & HATCHING SHEW THE NEW BUILDING.

THE INNER TEMPLE v. TEMPLE CHAMBERS COY (LIMITED).

[illegible] ARCHITECTS.


PLAINTIFF'S HOUSE
A
E
DRAWING RM
DINING RM.
CONSERVATORY
22'.8"
20'.10
Nº1 HOUSE
E
Nº2 HOUSE
A
DEFENDANT'S LAND

Architects.



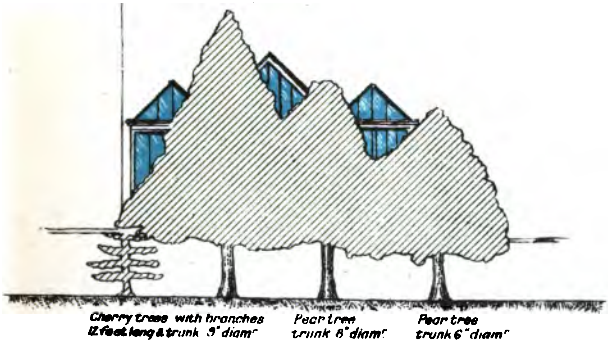
PLAINTIFF'S BUILDING —x— DEFENDANT'S BUILDINGS.

SECTION A.A.

TABLE SHEWING RAYS TO LIGHT TO PLAINTIFF'S BUILDING

	As existing	If Defendant's buildings were erected	
Horizontal see plan	57° / 21	57° / 27°	No loss
Vertical east to west Section D.D	180°	180°	No loss
Vertical to south west	45°	28°	17°
Exclusive of south east light to room — Totals	309°	292°	South east light not interfered with

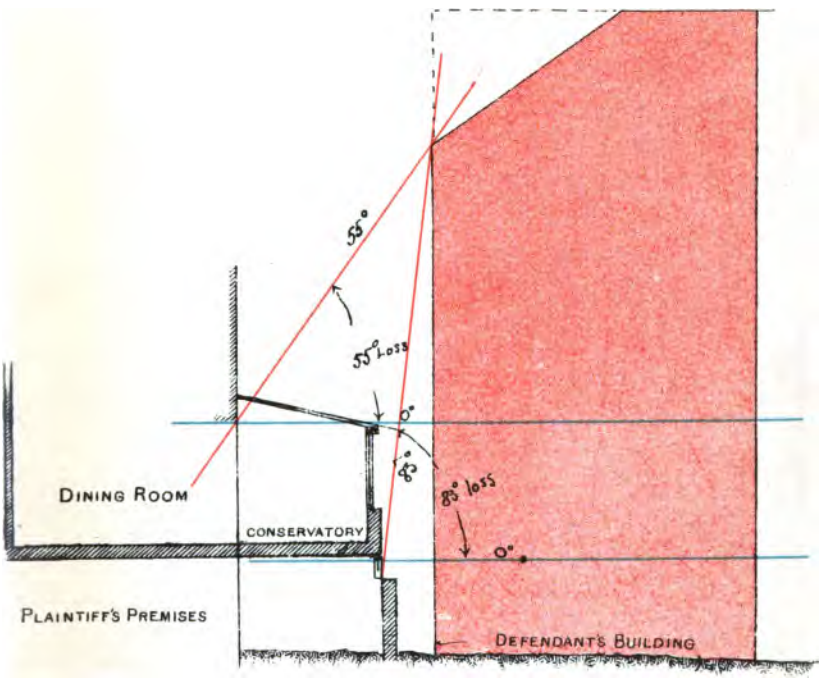
17° Less in a total lighting area of 309°



ELEVATION OF PLAINTIFF'S PREMISES LOOKING TOWARDS DEFENDANT'S LAND 30TH MAY 1894.

Whiteman & Bass Photo Litho London

Dunster Fletcher & Sons, 28 New Bridge Street, Ludgate Circus E.C. Architects.



SECTION E. E.

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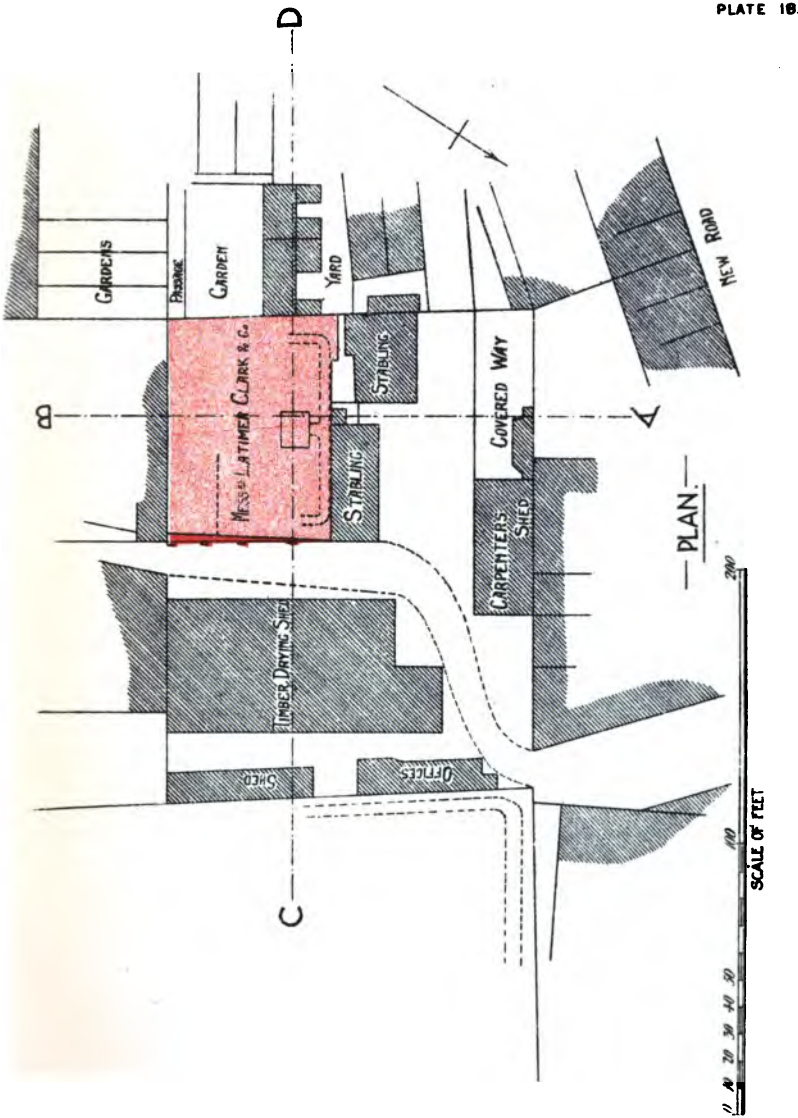
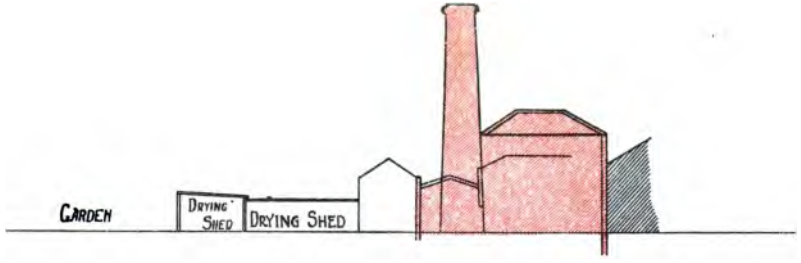
ALDIN & Co. V. LATIMER CLARK & Co.

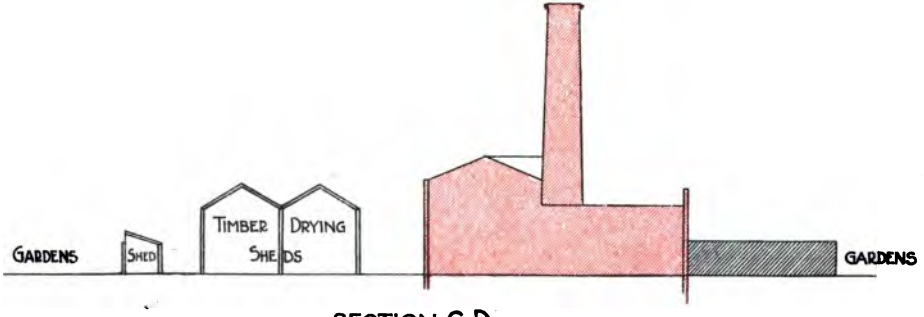
PLATE 18.



Architects.



— SECTION A-B —



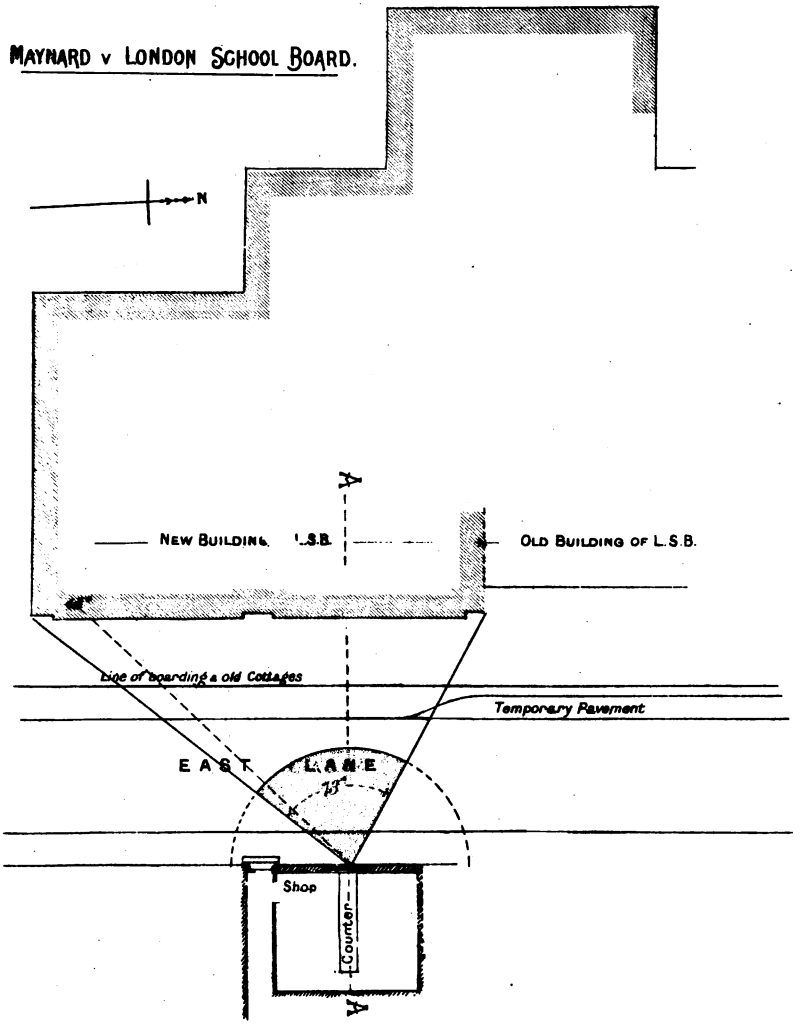
— SECTION C-D. —

0 10 20 30 40 50 100 SCALE OF FEET

ALDIN & Cº V. LATIMER CLARK & Cº

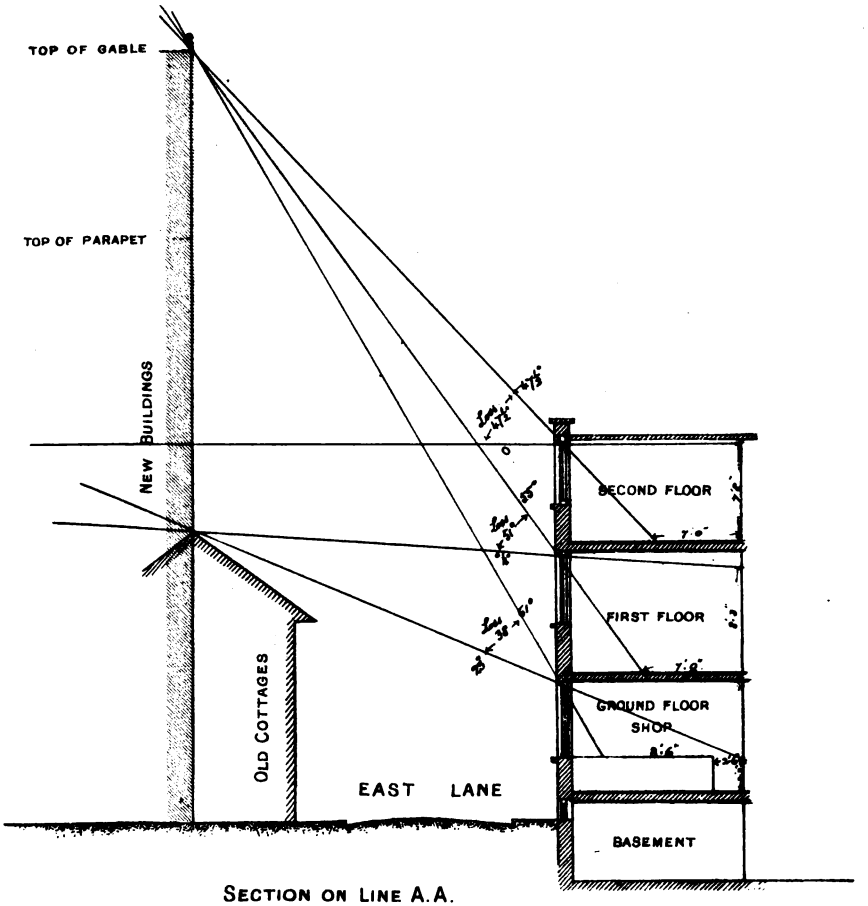
PLATE 19.

MAYNARD v LONDON SCHOOL BOARD.



Whiteman & Bass Photo-Litho London.

MAYNARD V. LONDON SCHOOL BOARD.

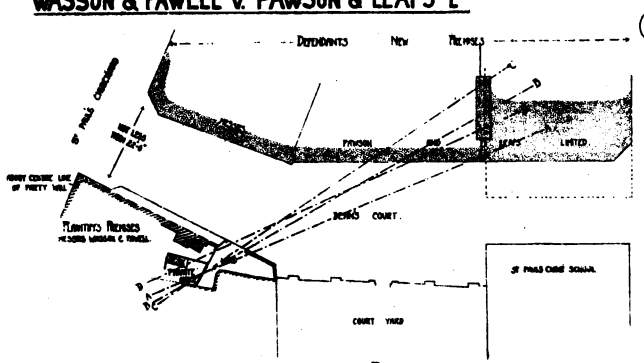


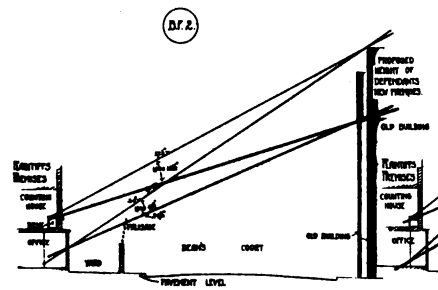
SECTION ON LINE A.A.

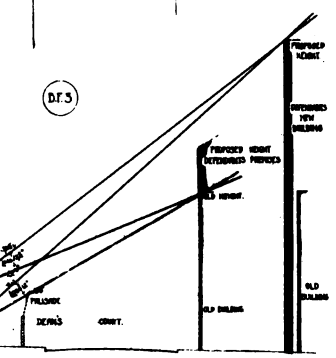
Whiteman & Bass *Photo-Litho* London

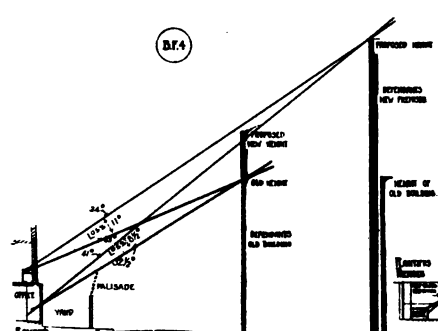
WASSON & FAWELL V. PAWSON & LEAFS LTD.

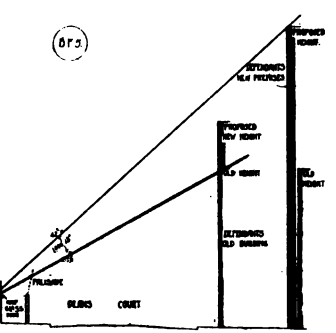
PLATE 22.











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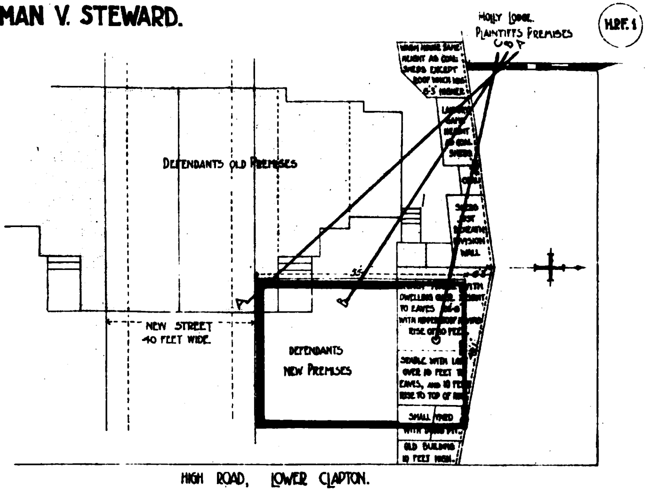
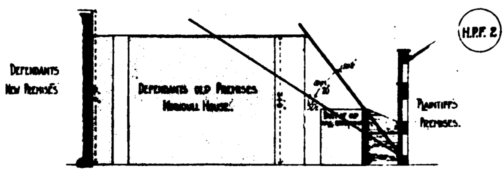
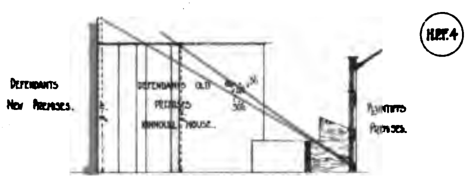
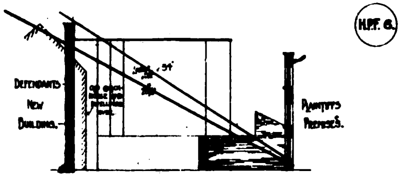




SECTION ON LINE A.A.



SECTION ON LINE B.B.



SECTION ON LINE C.C.

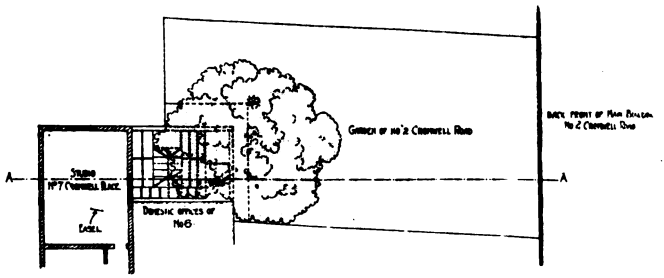
SCALE 10 20 30 40 OF FEET.

DUNSTER FLETCHER & SONS, 20, NEW BRIDGE STREET, LUDGATE CIRCUS E.C. ARCHITECTS.

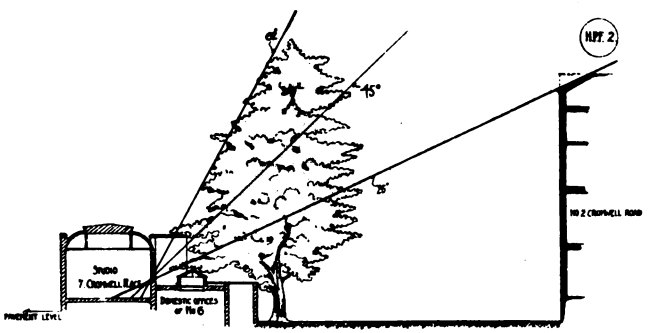
PLATE 24.

COOKESLEY V. LORD RUSSELL OF KILLOWEN.

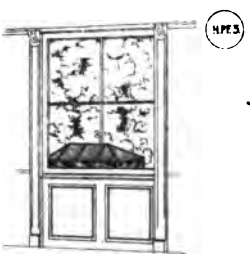
H.P.F. 1



PLAN.



SECTION ON LINE A'A



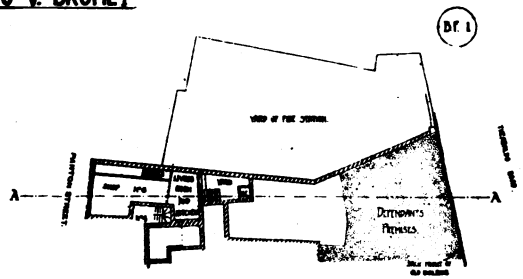
VIEW FROM EASEL IN STUDIO.

SCALE of feet

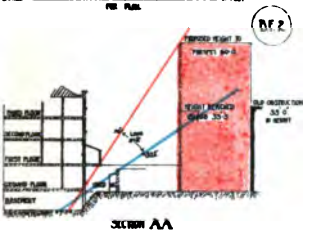
Bannister, Fletcher & Jones, 28, New Bridge Street, Ludgate Circus E.C. ARCHITECTS

BASSANO V. BROMET

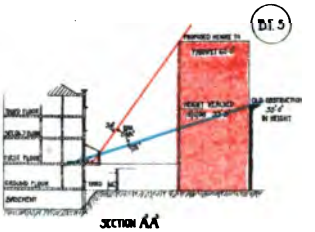
PLATE 25



PLAN



SECTION AA



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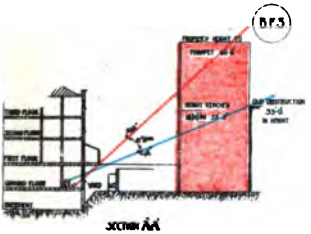

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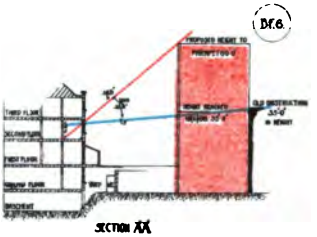

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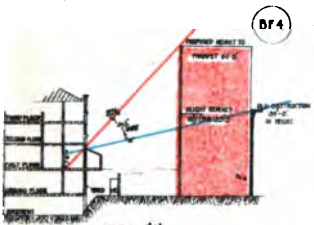

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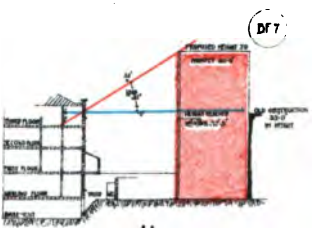


SECTION AA

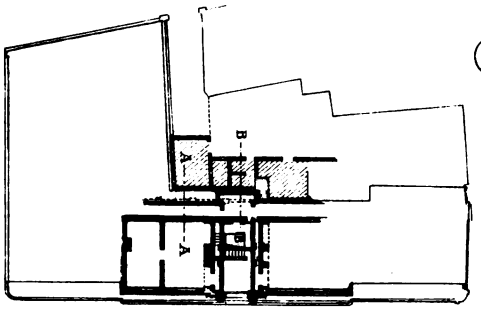
FOR SECTIONS

Whiteman & Bass *Photo-Litho* London.

LEVY BROS. V. HARRISON.

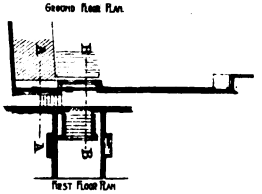
PLATE 26.

H.P.F. 1



GROUND FLOOR PLAN.

H.P.F. 2.



FIRST FLOOR PLAN

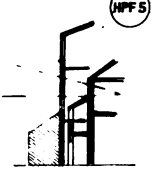
H.P.F. 3

ELEVATION.

H.P.F. 4

SECTION A.A.

H.P.F. 5



SECTION B.B.

BLACK LINES INDICATE PLAINTIFFS OLD PREMISES
RED LINES INDICATE PLAINTIFFS NEW PREMISES
GREEN LINES INDICATE DEFENDANT'S PREMISES.

SCALE 0 1 2 3 4 5 FEET.

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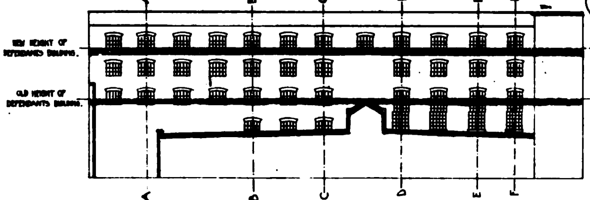
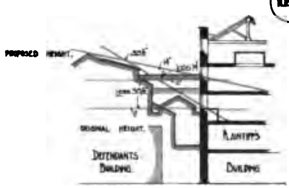
H.R.F. 4

H.R.F. 5



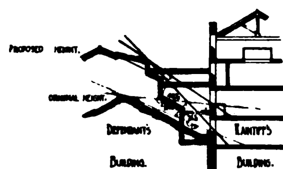
ELEVATION OF PLAINTIFF'S WINDOWS

H.R.F. 6



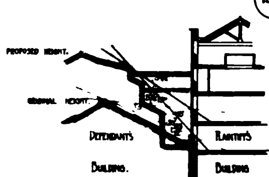
SECTION ON LINE A.A.

H.R.F. 7



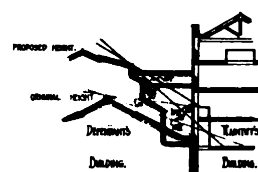
SECTION ON LINE B.B.

H.R.F. 8.



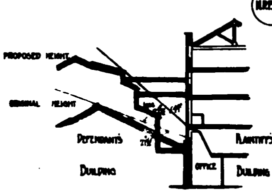
SECTION ON LINE C.C.

H.R.F. 9



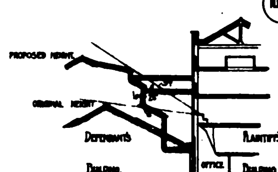
SECTION ON LINE D.D.

H.R.F. 10.



SECTION ON LINE E.E.

H.R.F. 11



SECTION ON LINE F.F.

SCALE OF FEET.

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